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Vol. I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1940~~ 1941

No. ~~624~~ 19

PHOENIX FINANCE CORPORATION, PETITIONER,

vs.

IOWA-WISCONSIN BRIDGE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH DISTRICT

PETITION FOR CERTIORARI FILED DECEMBER 13, 1940.

CERTIORARI GRANTED JANUARY 20, 1941.

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 11,734

CIVIL.

PHOENIX FINANCE CORPORATION A CORPORATION OF THE STATE OF DELAWARE, APPELLANT,

vs.

IOWA-WISCONSIN BRIDGE COMPANY, A CORPORATION, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA

REFILED MAY 22, 1940.

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IX

Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit at the October Term, 1940, of said Court, before the Honorable John B. Sanborn, the Honorable Joseph W. Woodrough and the Honorable Seth Thomas, Circuit Judges.

Attest:

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal)

Be it Remembered that heretofore, to-wit: on the 22nd day of May, A. D. 1940, a transcript of record pursuant to an appeal taken from the District Court of the United States for the Northern District of Iowa, was refiled after completion by the Clerk of the District Court in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein the Phoenix Finance Corporation, a Corporation of the State of Delaware, was Appellant and the Iowa-Wisconsin Bridge Company, a Corporation, was appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

[fol. 1] United States of America,
Northern District of Iowa—ss.

Pleas before the District Court of the United States in and for the Northern District of Iowa, Eastern Division, before Hon. Geo. C. Scott, Judge of the United States District Court for the Northern District of Iowa:

First Trust and Savings Bank (formerly Bechtel Trust Company), and A. H. Schubert, as Trustees; and Phoenix Finance Corporation, Inc., Complainants,
No. 220. vs. Equity.
Iowa-Wisconsin Bridge Company, a corporation, Defendant,

Fayette D. Kendrick, Warren G. Hayes, Anna W. Shuster, T. H. Bakewell, and Ernest W. Haverland, Interveners.

Be It Remembered, that heretofore, to-wit: on the 18th day of September, 1939, there was filed in the office of the Clerk of the United States District Court, in and for the Northern District of Iowa, for Eastern Division, at Dubuque, Iowa, Motion of Iowa-Wisconsin Bridge Company to file supplemental and ancillary bill of complaint, in the above-entitled cause, which is in words and figures as follows, to-wit:

(Motion of Iowa-Wisconsin Bridge Company for leave to file supplemental and ancillary bill of complaint.)

[fol. 2] Comes now Iowa-Wisconsin Bridge Company, the defendant in the above-entitled action, and moves this court for leave to file a Supplemental and Ancillary bill, in the above entitled cause and says:

(1) On the first day of December 1936 the final decree was entered in the above entitled action, a copy of which

is attached to the proposed Supplemental and Ancillary Bill.

(2) Since the entry of said decree, which was affirmed by the Circuit Court of Appeals of the United States for the eighth circuit, the complainant, Phoenix Finance Corporation, for the purpose of attempting to invalidate and nullify said decree has commenced and threatens to commence various suits in the courts of the state of Delaware and has done and is doing other acts, all as is more particularly and fully set out in said proposed Supplemental and Ancillary Bill.

(3) Said motion will be made on the verified proposed Supplemental and Ancillary Bill, copy of which is hereto attached, and upon all the records and files in the above entitled action.

F. A. ONTJES,
W. C. GREEN,
Attorneys for Defendant Iowa-Wis. Bridge Co.

Filed in the District Court September 18, 1939.

[fol. 3] (Order Granting Leave to File Supplemental and Ancillary Bill.)

This cause came on for hearing on motion of the defendant, Iowa-Wisconsin Bridge Company for leave to file Supplemental and Ancillary Bill, and it appearing that notice of such motion, with copy of said Supplemental and Ancillary petition thereto attached, having been served on the Phoenix Finance Corporation, Complainant, by service on Caspar Schenk, as resident agent of said corporation and as attorney of record for said Phoenix Finance Corporation, and the Court being fully advised in the premises, it is hereby

Ordered and Adjudged that the defendant, Iowa-Wisconsin Bridge Company is hereby granted leave to file such Supplemental and Ancillary Bill.

Done and ordered this 18th day of September, 1939.

GEO. C. SCOTT,
Judge U. S. District Court.

Filed in the District Court September 18, 1939.

[fol. 4] (Supplemental and Ancillary Bill.)

In the District Court of the United States for the Northern District of Iowa, Eastern Division.

First Trust & Savings Bank (formerly Bechtel Trust Company) and A. H. Schubert, as Trustees, and Phoenix Finance Corporation, Complainants,

#220. vs. In Equity.

Iowa-Wisconsin Bridge Company, a corporation, Defendant,

Fayette D. Kendrick, Warren G. Hayes, Anna W. Schuster, T. H. Bakewell and Ernest W. Haverland, Interveners.

Comes now the defendant Iowa-Wisconsin Bridge Company and with leave of court brings this its Supplemental and Ancillary Bill of complaint against complainant, the Phoenix Finance Corporation, and states:

(1) That the above entitled cause was commenced by the Bechtel Trust Company (now First Trust & Savings Bank) and A. H. Schubert as Trustees on an alleged deed of trust and bonds at the request and instigation of the complainant Phoenix Finance Corporation against the Iowa-Wisconsin Bridge Company and that a receiver was appointed of all the property of the bridge company and that thereafter petitions of intervention were filed by the above named interveners with leave and by order of court to defend said action; and the Phoenix Finance Corporation made a party complainant by order of court; and that said cause was heard and decree rendered as hereinafter set forth.

(2) That on the 1st day of December 1936 the court filed its opinion and findings of fact and final decree, which [fol. 5] was entered of record, copies of which are hereto attached, marked Exhibits "A", and "B" and "C" respectively, and are made a part of this Supplemental and Ancillary Bill. That by said final decree all matters and differences between the complainant Phoenix Finance Corporation and its predecessor, Phoenix Finance System, Inc. on the one hand and the defendant Iowa-Wisconsin Bridge Company on the other, were fully settled, adjudicated and determined, and that since the entry of said de-

cree there have been no business transactions whatsoever between said defendant Iowa-Wisconsin Bridge Company and said complainant Phoenix Finance Corporation or its predecessor.

(3) That following the entry of the decree aforesaid the complainant Phoenix Finance Corporation filed a petition for rehearing and prayed in the alternative that the decree be modified so as to withhold from adjudication the question of the validity of the $50,000 mortgage dated March 10, 1931, by permitting Phoenix Finance Corporation to institute an action at law against the bridge company if it so desired, for money had and received and be reinvested in said Phoenix Finance Corporation 517 shares of "A" stock surrendered in exchange for bonds. That the petition for rehearing and petition for modification of the decree were denied and that a copy of the order of the court overruling the petition for rehearing and motion for modification of the original decree is attached hereto, marked Exhibit "D" and made a part of this Supplemental and Ancillary Bill.

(4) That appeal from the said decree, orders, rulings and adjudication of this court was taken to the Circuit [fol. 6] Court of Appeals of the Eighth Circuit by the above named complainants, where the same was affirmed, a copy of said opinion of said court is hereto attached, marked Exhibit "E" and made a part hereof. That petition for Writ of Certiorari to the Supreme Court of the United States was denied and the mandate of the Circuit Court of Appeals was issued on the third day of April 1939 and on the 6th day of April 1939 was filed and entered in the office of the Clerk of this Court.

(5) That the above entitled action was commenced about the 28th day of August 1933. That a large number of depositions were taken which involved a great deal of time, very voluminous transcripts, hundreds of exhibits; the trial of this cause before the Master involved a number of weeks and the said trial a large amount of additional oral testimony was taken; that the hearing before this court on exceptions involved months of work and that the hearing before this court to settle the record and of this cause before the Circuit Court of Appeals involved many weeks of additional work; that this cause was defended

against the unjust claims of the Phoenix Finance Corporation at great expense to the bridge company and in said action the various claims of the Phoenix Finance Corporation were fully heard and adjudicated; that to relitigate the matters determined, piecemeal or otherwise would subject the bridge company to great expense and impair its credit and business to its irreparable injury.

(6) That notwithstanding the final adjudication and order of the District Court of the United States for the Northern District of Iowa, the complainant, Phoenix Finance Corporation is disregarding said adjudication and order, and for the purpose of attempting to invalidate and nullify the lawful decree and order of said court and for the [fol. 7] purpose of depriving this defendant of the fruits of said adjudication and for the purpose of harassing, vexing and annoying and destroying the business of this defendant, has commenced and is prosecuting and is about to prosecute in the State of Delaware numerous and divers suits and actions involving the same matters fully and finally determined by said United States District Court for the Northern District of Iowa and has further and in contempt of said court filed for record and recorded the $50,000 mortgage hereinbefore and hereinafter referred to held by said court to be fraudulent and invalid.

(7) That in particular said Phoenix Finance Corporation has commenced and is prosecuting the following suits against this defendant:

(a) Said Phoenix Finance Corporation filed an action entitled Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware versus the Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware in the Superior Court of the State of Delaware in and for New Castle County, the summons of said action being dated September 29, 1938 and the alleged cause of action being based on two certain alleged promissory notes, one of $2000 dated December 15, 1932 and one of $3125 dated January 20, 1933, which were involved in the above entitled cause and the adjudication thereof; that in this cause it was claimed that said notes and the alleged consideration thereof formed part of the consideration for

the issuance of $20,100 of the bonds involved in this action. That this court found that the said bonds were fraudulently issued and wholly without consideration and were more than offset by indebtedness of Phoenix Finance Corporation and its predecessor, Phoenix Finance System, Inc. to this [fol. 8] defendant, Iowa-Wisconsin Bridge Company. That in said cause in Delaware the defendant, Iowa-Wisconsin Bridge Company interposed the defense of res judicata and other defenses, such as want of consideration. That said cause was tried on the issue raised by the plea of res judicata, but has not yet been determined by the Delaware court.

(b) That on or about the 20th day of February 1939 the said Phoenix Finance Corporation commenced an action in the Court of Chancery of the State of Delaware in and for New Castle County entitled Phoenix Finance Corporation, a corporation of the State of Delaware, plaintiff versus Iowa-Wisconsin Bridge Company, a corporation of the State of Delaware, defendant, and caused subpoena to be issued therein and served on this defendant and filed bill of complaint, asking to recover 517 shares of Class "A" stock of the Iowa-Wisconsin Bridge Company, which was surrendered and cancelled at the time said Phoenix Finance Corporation fraudulently procured the issuance of $60,500 of bonds involved in and as found in this action, and which stock this court and the Circuit Court of Appeals ordered, adjudged and found the said Phoenix Finance Corporation was not entitled to have reissued to it. That this defendant answered in said cause, but that said cause has not been tried.

(c) That the said Phoenix Finance Corporation has commenced an action in the Superior Court of Delaware in and for New Castle County entitled Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware versus the Iowa-Wisconsin Bridge Company duly organized and existing under the laws of the State of Delaware and has caused summons to [fol. 9] be issued against said Iowa-Wisconsin Bridge Company returnable at Wilmington, Delaware on the 18th day of September next to answer said Phoenix Finance Corporation of a plea of trespass on the case, etc.; that said

summons was caused to be issued on the 22nd day of June 1939 and served on this defendant. That a copy of said summons is hereto attached, marked Exhibit "F" and made a part hereof.

(d) That the said Phoenix Finance Corporation commenced another action in the Superior Court of Delaware in and for New Castle County entitled Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware versus the Iowa-Wisconsin Bridge Company, duly organized and existing under the laws of the State of Delaware, and caused summons to be issued against said Iowa-Wisconsin Bridge Company returnable at Wilmington, Delaware on the 18th day of September next to answer said Phoenix Finance Corporation of a plea "that it hold and keep with it the covenant between them made according to the force and effect of said articles of agreement between them, etc." That the said Phoenix Finance Corporation caused said summons to be issued on the 22nd day of June, 1939, and caused the same to be served on this defendant. That a copy of said summons is attached, marked Exhibit "G" and made a part hereof.

(e) That the said Phoenix Finance Corporation commenced another action in the Superior Court of Delaware in and for New Castle County entitled Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware versus the Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware, and [fol. 10] caused summons to be issued against said Iowa-Wisconsin Bridge Company returnable at Wilmington, Delaware on the 18th day of September next to answer said Phoenix Finance Corporation of a plea of trespass on the case, etc. That said Phoenix Finance Corporation caused said summons to be issued on the 11th day of July, 1939, and served on this defendant. That a copy of said summons is hereto attached, marked Exhibit "H" and made a part hereof.

(f) That the said Phoenix Finance Corporation commenced another action in the Superior Court of the State of Delaware in and for New Castle County entitled Phoenix

Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware versus the Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware, and caused summons thereof to be issued against said Iowa-Wisconsin Bridge Company returnable at Wilmington, Delaware on the 18th day of September next to answer said Phoenix Finance Corporation of plea of trespass on the case, etc. That said Phoenix Finance Corporation caused said summons to be issued on the 17th day of August, 1939, and served on this defendant. That a copy of said summons is attached hereto, marked Exhibit "I" and made a part hereof.

(8) That no pleadings have been filed in the last four actions referred to and this defendant on account thereof is not able to more specifically state with respect thereto than as indicated in the summons in said causes, but this defendant alleges that [is] has had no business with the said Phoenix Finance Corporation since the commencement [fol. 11] of this action and alleges on information and belief that the said actions are a mere attempt on the part of the Phoenix Finance Corporation to re-litigate the matters [involvd] in this cause and decided by this court.

(9) That John A. Thompson who was found by this court in this cause as controlling the Phoenix Finance Corporation while dominating and controlling the bridge company in a fraudulent scheme, plan and conspiracy to cheat and defraud the bridge company and its stockholders, as president of the Phoenix Finance Corporation asserted about December 6th, 1938, since the rendition of this court's decisions and the decision by the Circuit Court of Appeals and the United States Supreme Court in this cause, that the litigation [involvd] in this action was not ended and would not be ended for a good many years. That on the 8th day of July, 1939, as president of the Phoenix Finance Corporation, said Thompson further asserted that one case had been tried in the courts of Delaware in June, 1939; that the thing, referring to the matters involved in this case, was not over, and that there were six cases in the State of Delaware [what] would be carried on in the course of the next few months.

(10) That the said John A. Thompson on the 23rd day of November, 1938, wrote the stockholders of the Iowa-Wisconsin Bridge Company: "I am not asking you or any other man to help me or to help Phoenix; Phoenix does not need any help in its fight to maintain its creditor position. In the end the facts will all be proved in competent courts, I am not a bit disturbed about the final outcome," etc.

[fol. 12] That on the 12th day of June, 1939, the said John A. Thompson, president of the Phoenix Finance Corporation wrote to a stockholder and director of the Iowa-Wisconsin Bridge Company:

"Now Phoenix claimed outright ownership of $97,000 and $60,500 or a total of $157,000 of the Bridge bonds. The $60,500 were bonds received in connection with the retirement of 517 shares of preferred stock which was unquestionably owned and paid for by Phoenix, so if the bonds were no good, certainly the Bridge Company must return the 517 shares of preferred stock to Phoenix. A suit is now pending in Delaware to enforce the Bridge Company to do that which it should in fairness and honesty do without a law suit, and there is not the slightest doubt that the Delaware courts will make the Bridge Company make good on the $60,500 of bonds or return the 517 shares of preferred stock. So while this law suit may have resulted in the elimination of the $60,500 of bonds as a bonded debt, that was not a gain of $60,500 to the Bridge Company by any means.

"As to the $97,000 worth of bonds, even if the mortgage deed of trust has been adjudicated and eliminated, and it is still shown that the Bridge Company owes the $97,000 for legitimate borrowings, it makes little difference whether the Bridge Company pays the debt by reason of a mortgage foreclosure or by way of a judgment and execution against the Bridge.

"We have to this point accounted for $22,400 of bonds in the hands of third parties, eliminated by legitimate retirement of the full amount owing thereon, and $157,500 worth [fol. 13] of bonds, the collection of which has been temporarily stayed, making a total of $179,000 and leaving $20,000 yet to be accounted for.

"These $20,100 of bonds were pledged as collateral against Bridge Company notes for borrowed money, total-

ing $17,735.19. Suits are now pending on these notes in the Delaware courts, and there is not the slightest chance that they will not be collected, because here Phoenix will have opportunity to present its evidence, which was never done in any of the proceedings in Federal Court, and could not properly be done because Phoenix and the Bridge Company, both being Delaware corporations, could not carry on as proper parties with adverse interests in a Feedral Court proceeding, as you well know."

That all of said matters were involved in this cause and determined by this court's decisions.

(11) That on June 2, 1939, the said John A. Thompson and Phoenix Finance Corporation caused to be recorded in the office of the County Recorder in Book L pages 625-626 of Allamakee County, Iowa, an alleged mortgage of the Iowa-Wisconsin Bridge Company to the Phoenix Finance System, Inc., in the sum of $50,000 dated March 10, 1931, which this court in this cause found to be without consideration, fraudulent and void, issued as a part of a scheme, plan and conspiracy to cheat and defraud the bridge company and its stockholders. That by the recording of said alleged mortgage said Phoenix Finance Corporation has wrongfully cast a cloud upon the title of this defendant to its property and has attempted to render null and [fol. 14] void that portion of the decree and order of this court finally determining the invalidity of said mortgage.

(12) That the complainant Phoenix Finance Corporation as hereinbefore set forth is threatening to and unless restrained by this court will proceed to institute and prosecute actions as aforesaid and will permit to remain on record the invalid $50,000 mortgage aforesaid; that unless said complainant Phoenix Finance Corporation is restrained by this court as herein prayed this defendant will be deprived of the fruits and advantages of the judgment, decree and orders of this court in this cause and said complainant will continue with vexatious suits in utter disregard thereof; that the acts of said Phoenix Finance Corporation will cast a cloud over defendant's franchises because of a multiplicity of vexatious suits brought and to be brought against defendant and it will be damaged in a way that cannot be repaired or estimated at common law, and

from these threatened wrongs this defendant has no remedy at common law but the only remedy is [is] equity.

Wherefore this defendant prays that the complainant Phoenix Finance Corporation and its officers, agents, servants and employees and atttorneys and all those acting by or through or for it or them and its successors and assignees be perpetually and forever, jointly and severally, enjoined and restrained from in any wise further proceeding, conducting or carrying forward, in any manner whatsoever, and from causing, procuring or suffering to be conducted or carried forward, in any manner whatsoever, any and all steps, motions and proceedings in the actions or [fol. 15] suits heretofore brought, instituted and commenced by said Phoenix Finance Corporation, complainant herein, against the above named Iowa-Wisconsin Bridge Company, defendant herein, in the courts of the State of Delaware, to which reference has been made in paragraph seven of this Supplemental and Ancillary Bill and from instituting, commencing, bringing or continuing or causing, procuring or suffering to be instituted, brought, commenced or continued any and all further actions or suits founded and based upon claims of said Phoenix Finance Corporation against this defendant, concerning which findings were made by this court in this action or which were determined by this court in its order denying the petition for rehearing and motion for modification of decree by said Phoenix Finance Corporation, or which were determined by the Circuit Court of Appeals of the United States for the Eighth Circuit upon the appeal of said Phoenix Finance Corporation, and that said Phoenix Finance Corporation, its officers, agents, servants, employees and attorneys be commanded and ordered forthwith to dismiss upon the merits all those actions and suits heretofore commenced by them against this defendant in the State of Delaware and particularly those mentioned and referred to in paragraph seven of this Supplemental and Ancillary Bill. Further, that said Phoenix Finance Corporation, its officers, agents, servants, employees and attorneys be commanded and ordered forthwith to satisfy and remove from the records of the County Recorder of Allamakee County, Iowa, a certain mortgage executed by Iowa-Wisconsin Bridge Company to Phoenix Finance System, Inc., dated

March 19, 1931, recorded in the office of said County Re-
[fol. 16] corder of said Allamakee County, Iowa, on the 2nd day of June, 1939, in Book L at pages 625-626, covering property and assets of said Iowa-Wisconsin Bridge Company, and that said Phoenix Finance Corporation surrender the original of said mortgage and any purported notes secured thereby to this court for cancellation. This defendant further prays that in the meanwhile a preliminary injunction be granted by and issued out of this court, enjoining, restraining and commanding the said acts and proceedings during the pendency of this action, and for such other and further relief as to the court may seem just and equitable.

Dated this 8th day of September, A. D. 1939.

F. A. ONTJES,
W. C. GREEN,
Attorneys for Defendant,
Iowa-Wisconsin Bridge Company.

[fol. 17] State of Iowa,
Cerro Gordo County.—ss.:

F. A. Ontjes and W. C. Green, being each duly sworn for himself deposes and says that he is one of the attorneys for the defendant in the above entitled action; that he has read the above and foregoing Supplemental and Ancillary Bill and knows the contents thereof and that the same is true, except as to the matters therein set forth on information and belief, and as to those he believes them to be true.

F. A. ONTJES,
W. C. GREEN.

Subscribed and sworn to before me by the said F. A. Ontjes and W. C. Green this 9th day of September, A. D., 1939.

(Seal)

F. T. BARRETT,
Notary Public in and for
Cerro Gordo County, Iowa.

Filed in the District Court, September 18, 1939.

[fol. 18] Exhibit "A"

Opinion of District Court

United States District Court, Northern District of Iowa, Eastern Division

Bechtel Trust Company, and A. H. Schubert, Trustees, Plaintiffs,

No. 220 vs. In Equity

Iowa-Wisconsin Bridge Company, Defendant,

Fayette D. Kendrick, et al., Interveners.

"This is a suit in equity by trustees under a trust deed, purporting to secure a $200,000 issue of bonds, and that purports to convey to the trustees an interstate bridge across the Mississippi River from the town of Lansing in Allamakee County, Iowa, to a point on the opposite Wisconsin shore. Plaintiffs' bill alleges default and a breach of condition in failure to pay the principal of two bonds of $5,000. each, the interest upon the entire issue, and the taxes on the bridge. The defendant, Iowa-Wisconsin Bridge Company, hereinafter referred to as the Bridge Company, appeared timely and answered the bill, alleging in substance that a majority of the stock of the Bridge Company was owned by directors and stockholders of the Phoenix Finance System, Inc., who were also officers and directors of the Bridge Company, and that the bonds were issued to the Phoenix Finance System, Inc., in exchange for stock in the Bridge Company unlawfully surrendered and returned to the Bridge Company. Not much progress was made under this answer and later Fayette D. Kendrick, a stockholder in the Bridge Company and certain other stockholders, were permitted to intervene and join as defendants, and the petition of intervention of such stockholders by Order was permitted to stand as an answer in behalf of the Bridge Company. After process of amendment this pleading after alleging the necessary jurisdic-[fol. 19] tional facts, as a defense alleges in substance that at the time of the execution of the trust deed and the issuance of the bonds the Bridge Company was in complete control of one John A. Thompson who controlled a majority of its voting stock and who controlled its officers and board of directors, and who was also the president and

owner of a controlling interest in the Phoenix Finance System, Inc., and controlled its officers and board of directors, and other subsidiary companies; and that the said Thompson in fraudulent conspiracy with others who were officers and directors of the Bridge Company, and also officers and directors of Phoenix Finance System, Inc., planned and schemed to acquire the ownership of said bridge to the exclusion of the Bridge Company and its other stockholders, and as a part of such fraudulent scheme and plan caused the bonds in question to be issued and the trust deed purporting to secure the same to be executed without lawful consideration to the Bridge Company, and particularly that the said John A. Thompson caused approximately $60,500 in bonds to be issued in exchange for stock in the Bridge Company unlawfully surrendered by him or his controlled company, Phoenix Finance System, Inc.; and caused to be built up on the books of the Bridge Company a false and fictitious account in the sum of approximately $97,000., indicating and declaring in substance that the Bridge Company owed Phoenix Finance System, Inc., such sum, and caused bonds in that aggregate amount to be issued without consideration to the Bridge Company; and other things done and accomplished by said John A. Thompson in pursuance of said fraudulent conspiracy to the end that said trust deed and all of said bonds so issued are fraudulent and void.

After issue joined, by Order of the Court in pursuance of agreement of parties, the cause was referred to Hon. James W. Kindig, as Special Master in Chancery to hear and report the evidence with findings of fact and conclusions of law in pursuance of the existing Equity Rules. The Master qualified and proceeded with his long and [fol. 20] arduous task and after fifty-five days devoted to the taking of testimony, filed his report which with the exception of a number of comparatively minor items aggregating in all approximately $27,000., found the issues for the defendants and interveners.

In due time the Trustees, plaintiffs, and Phoenix Finance Corporation, successor to Phoenix Finance System, Inc., which in the meantime had become a party plaintiff to the suit, filed exceptions to the Report of the Master. The

defendants also filed certain exceptions to the findings of the Master unfavorable to them. The cause then came before the Court upon the various exceptions to the Master's Report, which were submitted after oral arguments and very voluminous and complete briefs by all parties.

The Master in his Report, after reciting briefly the historical features of the case and the issues as defined by the pleadings, makes fourteen specifically numbered findings of fact. I shall here refer to them in their numerical order.

Finding 1. That on February 20, 1932, the Bridge Company executed the trust deed as of date, however, January 1, 1932, to secure a bond issue of $200,000 and complainants were named as trustees.

Finding 2. That the Bridge Company as of January 1, 1932, purported to authorize the issuance of $200,000 of bonds.

Finding 3. That the principal on the bonds, together with interest and taxes, as alleged in the complaint, are in default.

Finding 4. (a) That John A. Thompson before the issuance of the bonds or authorization of the trust deed, came into control and management of the Bridge Company.

(b) That during all of that time and thereafter said Thompson also controlled the Phoenix Finance System, Inc., and affiliated companies.

Finding 5. That notwithstanding certain inhibitory pro- [fol. 21] visions in its charter, the Bridge Company through the influence of Thompson and his associates, caused $60,500 of bonds to issue to Thompson or Phoenix Finance System, Inc., in exchange for Class A stock held by him, without giving like opportunity to other stockholders.

Finding 6. That the issuance of said bonds in consideration of the surrender of the said shares impaired the capital of the Bridge Company, and was in violation of a statute of Delaware under which the Bridge Company was incorporated.

Finding 7. That the action of Thompson in promoting such exchange of shares for bonds, was fraudulent and for

the purpose of conferring upon himself a preference over other holders of Class A stock.

Finding 8. That $97,000 of the bonds were transferred by the Bridge Company to Thompson or his controlled companies on a pretended book account originating out of a pretended mortgage for $50,000. covering an obligation which J. W. Shaffer & Company was in duty-bound to perform under its construction contract, and which contract provided for a surety company performance bond, which Thompson permitted Shaffer & Company to omit to furnish. That Thompson and his companies did not, in fact, perform the obligation on behalf of Shaffer & Company, but built up a pretended account to make it falsely appear that Shaffer & Company failed in its duty, and that Thompson and his controlled companies expended $97,000. in such performance. But as a matter of fact, Thompson and his controlled companies only expended $9,000. in payment to a sub-contractor in settlment of a mechanic's lien, and that $88,000 of said $97,000 of bonds was without consideration.

Finding 9. That resolutions pretended to have been passed by the Bridge Company authorizing said $97,000 issue of bonds were not genuine and legal resolutions so far as they related to $88,000 of the $97,000 issue, but were [fol. 22] procured through the influence and connivance of Thompson and his associates, and that independent directors and stockholders voting in support of such resolutions, were deceived and misled by misrepresentations of Thompson.

Finding 10. (a) That of said bonds the Bridge Company received full consideration for the said $9,000 thereof paid in settlement of the mechanic's lien.

(b) That of $7,400. of bonds issued to Helmer N. Anderson, the Bridge Company received consideration only of $6000.

(c), (d), (e), (f) and (g) were five $1,000 bonds issued in settlement and compromise of five disputed claims, and the Bridge Company received full consideration.

(h) Respecting $10,000 of bonds issued to Bradshaw, Schenk & Fowler, attorneys, to secure two notes aggregat-

ing $4,000 the Bridge Company received consideration to the extent of $4,000.

(i) That the remaining bonds, approximating $19,000 or $20,000., were issued to the Phoenix Finance Corporation as security for a note of $3,125. given in part to secure an advance for the payment of taxes of the Bridge Company, and that said bonds were valid only to the extent of said note.

(j) That of the bonds held by Bradshaw, Schenk & Fowler in the amount of approximately $6,000., are without consideration and invalid.

(k) That of the bonds above issued to Phoenix Finance Corporation to secure the note of $3,125., approximately the sum of $16,975. are without consideration and obtained by fraud and invalid.

Finding 11. That Thompson, speaking for himself and the Phoenix Finance System, Inc., and his other affiliated institutions, admitted that he and his institutions owned at least ninety per cent of the total $200,000. bond issue, and now hold the same.

Finding 12. That as alleged in paragraph 18 of the petition of intervention, any demand before the commencement of this suit that might have been made by the inter- [fol. 23] veners to obtain relief from the issuance of said bonds from and through the defendant corporation, would have been unavailing.

Finding 13. That the Bridge Company was not making, and would not have made, a good faith defense to the complainants' action had not the interveners intervened.

Finding 14. That the interveners and defendant are not estopped to make their defense. That the purported ratification and estoppel claimed by complainants was brought about through connivance and control by said Thompson, as was the original conspiracy and fraud, and that so far as independent stockholders and directors are concerned, they did not know of the fraud and conspiracy when taking action.

I have not undertaken to quote the Master's language, but have given the substance of each finding somewhat condensed.

The Master in his Report returned twelve numbered conclusions of law. I shall now quote these in their entirety with the Master's citation of authority:

'1. That by the introduction into the record of the deed of trust and evidence of the issuance of the bonds thereunder, the complainants have made out a prima facie case.

2. When a suit, as in the case at bar, is brought in the interests of one (Thompson) who holds or controls the majority of the stock in the defendant corporation, and his interests in the suit is against the interest of the corporation, and the directors (except director Haehlen) of the corporation failed, as in this case, to defend in good faith, the interveners in the case at bar, as stockholders, may intervene and defend in behalf of the corporation. Fletcher, on Corporation, Vol. 13, sec. 5853; Whittacker vs. Brictson Mfg. Co. (8 C. C. A.) 43 Fed. (2d) 485, at 489; Palmer vs. Bankers Trust Co., et al., 12 Fed. (2d) 747; Mecartney vs. Guardian Trust Company (8 C. C. A.) 230 Fed. p. 64; Delaware & Hudson Co. vs. Albany & Susquehanna Railroad Company, 213 U. S. 435 (53 L. ed. 862); Federal Equity Rule 27.

[fol. 24] 3. Although in the case at bar the mortgage on the property of the defendant, Bridge Company, is in the nature of a deed of trust to secure bonds, yet so far as the defense here involved is concerned the position of the complainants is analogous to an attempt on the part of the plaintiff to foreclose an ordinary mortgage securing a note, and fraud and want of consideration are available to the defendant and interveners against the complainants and alleged bondholders. 41 Corpus Juris, 283, sec. 8; Shillaber vs. Robinson, 97 U. S. 68, 24 L. Ed. 967; Fletcher, on Corporations, Vol. 7, p. 341, sec. 3179; Fletcher, on Corporations, Vol. 7, p. 428, sec. 3262, also sec. 3278; 8 Corpus Juris p. 984, sec. 1292; Lytle vs. Town of Lansing, 147 U. S. 59.

4. Where, as in the case at bar, Thompson, a stockholder and director in the Bridge Company, and also a stockholder and director of the Phoenix Finance System, Inc., and

affiliated companies, gained a personal advantage as he did in the bond issue while he as such stockholder and director controlled both the Bridge Company and the Phoenix Finance System, Inc., and affiliated companies, the burden was upon him to show that the transactions between the Bridge Company and the Phoenix Finance System, Inc., and affiliated companies were entirely fair, free from fraud and overreaching. Fletcher, on Corporation, Vol. 3, p. 307, sec. 944; Tower-Hill-Connellsville Coke Co. vs. Piedmont Coal Co., 62 Fed. (2d) 817; Corsicana National Bank vs. Johnson, 251 U. S. 68; Geddes vs. Anaconda Copper Mining Co., 254 U. S. 590; Washburn, et al. vs. Green, et al., 133 U. S. 30; Globe Woolen Co. vs. Utica Gas & Electric Company, 121 N. E. 378; Fletcher, on Corporations, Vol. 3, pp. 355, 356, Sec. 973; Backus vs. Finkelstein, 23 Fed. (2d) 257; Thomas & Bronville Ft. K. & P. Ry. Co., 109 U. S. 522, 27 L. ed. 1018; Jones vs. Missouri-Edison Electric Co., 144 F. 765; Heim vs. Jobes, 14 F. (2) 29; Twin Lick Oil Co. vs. Marbury, 91 U. S. 587, 23 L. ed. 328; Fletcher, on Corporations, Vol. 3, p. 298, sec. 937.

[fol. 25] 5. That under the facts above found, it is apparent as a matter of law that the complainants did not furnish the necessary proof to sustain the validity of the bonds, except the bonds specifically named in paragraph ten of the findings of fact, and the prima facie showing made in the first instance by the complainants has been overcome by evidence of the defendant and interveners except as to those bonds especially named as having consideration in paragraph ten of the findings of fact, and all the said bonds not named in said paragraph ten of the findings of fact as having consideration, are illegal and void because they were issued fraudulently.

6. That excluding the said bonds specifically mentioned in paragraph ten of the findings of fact as having consideration, approximately $112,375.00 of the balance of the said bonds issued to the said Thompson and his companies, not in exchange for stock but on a fraudulently alleged consideration purporting to appear upon the books of the Iowa-Wisconsin Bridge Company, were issued without legal consideration and are therefore void. (See cases above cited).

7. That the issuance of the said bonds, amounting to approximately $112,375.00, last named, to the said Thompson or the Phoenix Finance System, Inc., or other affiliated companies and others, was void regardless of the said lack of legal consideration because such bonds under the circumstances were, under the findings of fact above named, fraudulently obtained, except that the said bonds held as excessive security by the said Bradshaw, Schenk & Fowler, named in paragraph ten of the findings of fact, were not fraudulently obtained but are being held without consideration except insofar as the same are held as security for the two notes named in said paragraph ten of the findings of fact.

8. That at the time of the bond issue in question and at the time Thompson, for himself or his controlled companies, [fol. 26] caused the Bridge Company to transfer to himself or to his controlled companies approximately $60,500.00 of Class A preferred stock of the Bridge Company for that amount of the bonds of the Bridge Company, it was the law of Delaware that a corporation, as the Bridge Company in the case at bar, could not purchase its own stock, when, as was the case here, the use of its funds so to do caused an impairment of the capital of the corporation. (See Sec. 191, General Corporation Laws of Delaware).

9. That under the Articles of Incorporation of the Bridge Company at the time the Class A stock belonging to Thompson or to his companies was exchanged for the bonds of the Bridge Company, there was in existence a provision in the Articles of Incorporation of the Bridge Company making the transaction illegal and void because neither all the stock of like kind was redeemed at said time, nor was the portion thus redeemed duly called by lot after due notice, so as to provide fairness and equality between like stockholders.

10. That because such exchange of stock for bonds was done for the sole advantage of the said Thompson and his companies and to the disadvantage of the other like stockholders, the transaction was fraudulent and voidable. (See cases above cited).

11. That in view of the fact that the said Thompson and his companies were not (except as hereinafter stated) good faith purchasers of any of the said bonds for a valuable consideration, and in view of the fact that the said Thompson and the said companies now own at least ninety percent of the said $200,000.00 bond issue, such portion of the said bonds cannot be enforced in this foreclosure proceeding by the complainant, except that the bonds named in paragraph ten in the findings of fact as having been issued in good faith and for a consideration are valid and may be enforced accordingly.

[fol. 27] 12. That the defendant and interveners are not estopped from making the defenses set forth in the answer and cross-petition because, so far as Thompson and the stockholders and directors under his control are concerned, the same fraudulent influence vitiated the alleged ratification that vitiated the original transaction, and, so far as the independent stockholders and directors are concerned, they did not know of the fraud of Thompson at the time they are alleged to have voted for the purported ratification.

As I have stated, the plaintiff trustees and their co-plaintiff, Phoenix Finance Corporation, filed exceptions to the Master's Report separately, but inasmuch as the plaintiff trustees as their second exception adopted all of the exceptions of Phoenix Finance Corporation, I shall first enumerate the exceptions interposed by Phoenix Finance Corporation. I shall not attempt to quote the exceptions at large as they are prolix and argumentative:

Phoenix Corp.'s Exception No. 1: Challenges the Master's finding of fact No. 4 (a), which is to the effect that John A. Thompson before the issuance of the bonds or the authorization of the trust deed, came into control and management of the Bridge Company.

Phoenix Corp.'s Exception No. 2: Challenges the Master's finding of fact No. 4 (b), that during all of that time and thereafter John A. Thompson controlled the Phoenix Finance System, Inc., and affiliated companies.

Phoenix Corp.'s Exception No. 3: Challenges generally the Master's findings of fact numbered 5, 6, 7, 8, 9 and 10,

which findings are in effect findings of fraud on the part of Thompson and his controlled officers and directors in bringing about the issuance of the bonds and the execution of the trust deed in question.

[fol. 28] Phoenix Corp.'s Exception No. 4: Challenges the Master's findings of fact numbered 5, 6 and 7, in disallowing and holding void $60,500. of bonds transferred to Phoenix Finance System, Inc.

Phoenix Corp.'s Exception No. 5: Challenges the Master's findings of fact numbered 8 and 9, in which the Master found only $9,000 of the $97,000. issue of bonds to have been issued for a consideration; and that the resolutions relating thereto were the result of influence and connivance on the part of Thompson and his associates.

Phoenix Corp.'s Exception No. 6: Challenges the Master's findings of fact Nos. 10(i) and (K), in finding "$19,000 to $20,000" pledged to Phoenix Finance Corporation to secure a note of $3,125., invalid and without consideration except to the extent of $3,125.

Plaintiffs then except separately to each of the Master's conclusions of law and to each of the Master's recommendations.

Plaintiff trustees in addition to the adoption of all exceptions of the Phoenix Finance Corporation, interpose particular exceptions as follows:

Trustees' Exception No. 1: Challenges generally the Report of the Master for assuming to consider and pass upon the validity of any of the bonds; it being the plaintiff's contention that the Master should have considered the validity of the trust deed and whether the plaintiffs were entitled to foreclosure the same for any amount, and then thereafter to give each and all of the bondholders separate hearings upon the validity of the bonds held by them.

Numerous other exceptions were interposed by the plaintiff trustee which I think need no separate consideration in this opinion, inasmuch as the questions presented are all involved in the exceptions of the Phoenix Finance Corpo-
[fol. 29] ration adopted by the plaintiff trustees.

The defendant and interveners filed eleven exceptions to the report of the Master, but later withdrew exceptions One, Two, Five and Ten. The exceptions not withdrawn are:

Deft. and interveners' Exception Three: This exception challenges the Master's finding of fact No. 10 (d) that the $1,000 bond issued to J. W. Dempsey was based upon a consideration and valid.

Deft. and interveners' Exception Four: This exception challenges the Master's Finding of fact No. 10 (e), that the $1,000. bond issued to the Lyle Sign Company was based upon a consideration and valid.

Deft. and interveners' Exception Six: This exception challenges the Master's finding of fact No. 10 (g), that the $1,000. bond issued to Cobb, Hoke, Benson and Faegre, attorneys, was based upon a consideration and valid.

Deft. and Interveners' Exception Seven: This exception challenges the Master's finding of fact No. 10 (h), that the $10,000. of bonds issued to Bradshaw, Schenk & Fowler, attorneys, as security for two notes aggregating $4,000. were received for a consideration and valid.

Deft. and interveners' Exception Eight: This exception challenges so much of the Master's fifth conclusion of law as makes the following exception to such conclusion: "except the bonds specifically named in paragraph 10 of the findings of fact;" and to so much of the Master's seventh conclusion of law as makes exception to such conclusion; and to so much of the Master's eleventh conclusion of law as makes exception to such conclusion, because the record does not warrant the exceptions.

Deft. and interveners' Exception Nine: This exception challenges paragraph two of the Master's recommendations containing the following, to-wit:

[fol. 30] "That the said Bill of Foreclosure of the said complainants, so far as it relates to the said bonds named in paragraph ten of the findings of fact as being based upon a consideration, should not be dismissed, but the prayer of foreclosure therein made should not be granted; that is to say, the deed of trust mentioned in the Bill of

foreclosure so far as it relates to the bonds named in this recommendation, amounting to $27,125.00, should be foreclosed."

Deft. and interveners' Exception Eleven: This exception challenges paragraph four of the Master's recommendations relative to the proportioning of costs.

Disposition of the exceptions to the Master's report has required a careful review and consideration of the entire record. It is fitting that somewhat of the corporate history preceding the issuance of the bonds in controversy, should be here stated. Early in the year, 1928, a group of business men of the town of Lansing, Allamakee County, Iowa, hereinafter referred to as the Lansing Bridge Committee, conceived the idea of promoting the building of a toll bridge from Lansing over the Mississippi River to a point on the Wisconsin shore. To that end through their efforts on March 10, 1928, Congress passed an Act authorizing the construction of such bridge, and on March 20, 1928, the Lansing Bridge Committee effected the incorporation of the Lansing Bridge Company under the laws of Delaware. During the succeeding year the articles of incorporation were amended, changing the name to the Iowa-Wisconsin Bridge Company and altering the original plan of capitalization so that the authorized capital stood at 3750 shares of Class A stock, which was a preferred non-voting stock of a par value of $100. per share, bearing a stipulated cumulative dividend and redeemable according to certain conditions of the articles; and also 3750 shares of common stock of no par value. Little was accomplished for a year and a half after the incorporation of the Bridge [fol. 31] Company, and during the summer of 1929 the Lansing Bridge Committee and certain directors of the Bridge Company contacted and had certain negotiations with John W. Shaffer of Minneapolis, Minnesota. Shaffer had organized a corporation under the laws of the Minnesota under the name, Standard Shares Holding Company, and he also had a partner and associate, Vernon W. O'Connor, also of Minneapolis. As a result of the negotiations with Shaffer the Company acting through members of the Lansing Bridge Committee, who designated themselves as the Lansing Bridge Company, entered into a trust

agreement with Shaffer's Standard Shares Holding Company by the terms of which—at least as construed by the parties—the Bridge Company in effect abdicated all of its functions to the Standard Shares Holding Company for the purpose of constructing the bridge, including the issuing and disposition of the shares of stock of the Bridge Company, but limiting the cost of the completion of the bridge to $600,000. This contract was executed on October 26, 1929, and thereafter Shaffer, through his Standard Shares Holding Company, which he owned and controlled, proceeded with the promotion and construction of the bridge. The career of the project under Standard Shares Holding Company extended over approximately a year's time and was exceedingly checkered in hue. During that year the Standard Shares Holding Company, through stock of the Bridge Company issued to it, completely controlled that corporate organization. On November 9, 1929, the Bridge Company under Shaffer employed Shaffer to engineer the bridge contract for ten per cent of the total construction cost. This contract was assigned to John W. Shaffer & Company another of Shaffer's corporations. On December 7, 1929, Standard Shares Holding Company acting by Shaffer, contracted with Shaffer's partner, Vernon W. O'Connor, to do the grading for the bridge approaches at the rate of 24 cents per cubic yard. This work was immediately sub-let by O'Connor to Kra[illegible] & Hogg at fifteen cents per cubic yard, and later O'Connor re-assigned the original contract to Shaffer & Company. In December, 1929, Standard Shares Holding Company for the Bridge [fol. 32] Company, still acting by Shaffer, contracted with O'Connor to build the sub-structure of the bridge for $193,196.81, estimates to be approved and work to be accepted by Shaffer. This contract was immediately sub-let by O'Connor to Industrial Contracting Company for a maximum of $120,748., but was actually completed for approximately $98,000 and on April 4, 1930, this original contract was re-assigned to John W. Shaffer & Company. Under these contracts the grading and sub-structure of the bridge were practically completed during the first year. A large amount of stock in the Bridge Company was sold all at $100. per share, common and preferred selling at the same price.

The grading and substructure of the bridge was nearing completion on October 1, 1930, and the limitation under the trust agreement for the completion of the bridge was also about to expire. Shaffer and his Standard Shares Holding Company had experienced a slowing up of the sale of shares of the Bridge Company, and began to cast about for aid, both in a financial way and in the movement of stock sales.

As has been stated, up to this time John W. Shaffer had complete control of the Bridge Company and his partner, O'Connor, at his instance, had been made president. The previous construction contracts had been held by Shaffer himself, or his solely owned John W. Shaffer & Company, and assignments had been made to V. W. O'Connor his partner, and thereafter sub-contracts had been made with the real concerns who did the grading and completed the substructure. Between the price paid the sub-contractors for actual construction and the original contract price which Shaffer caused to be agreed to be paid to himself, there was a wide difference. Interveners' claim that a pretty thorough job of looting had been done up to this point seems not to be without foundation. The point had been reached when construction of the superstructure was about to begin, contracts had been negotiated for the steel with McClintic-Marshall Company of Pittsburgh, and for [fol. 33] the putting up of the steel, that is the construction of the superstructure, contract had been negotiated with Industrial Contracting Company of Minneapolis. These companies demanded responsible assurance that payments to them would be promptly met. Shaffer through his personally owned corporation, John W. Shaffer & Company, was to have the primary contract for the construction of the superstructure, and the contracts with McClintic-Marshall Company and with Industrial Contracting Company were to be sub-contracts. In these circumstances sometime in October, 1930, John W. Shaffer contacted John A. Thompson who had an office with Shaffer and his concerns in the Phoenix Building in Minneapolis, Minnesota.

John A. Thompson, as the record indicates, was a promoter and financier. He was president, principal owner and in control of Phoenix Finance System, Inc., apparently

both an active and a holding company. Thompson had caused to be created some six or seven other Phoenix companies only one of which besides Phoenix Finance System, Inc., shows in these transactions. Thompson also was the sole owner of a corporation known as Thompson & Company, which it is claimed was a stock selling and brokerage concern. Thompson & Company shows prominently in the negotiations touching this case. The negotiations between Shaffer and Thompson resulted in an agreement that Thompson should have complete control of the Bridge Company, that Phoenix Finance System, Inc., would guarantee the sub-contractors, McClintic-Marshall Company and Industrial Contracting Company, their payments. That the principal contract for the building of the superstructure should be let to John W. Shaffer & Company. That a substantial block of stock in the bridge should go to finance Phoenix Finance System, Inc., for its services. As a result of these agreements on November 1, 1930, the board of directors of the Bridge Company was convened and the by-laws of the corporation were amended increasing the [fol. 34] number of directors, and thereupon immediately afterward J. A. Thompson, A. B. Wilder, H. T. Wagner and Edward O'Connor, were elected directors. Vernon W. O'Connor then resigned as president and J. A. Thompson was elected in his stead. Suffice to say from that time on until shortly before this suit was commenced J. A. Thompson and other officers of Phoenix Finance System, Inc., and other employees of that company controlled completely the Iowa-Wisconsin Bridge Company, notwithstanding there were more than two hundred fifty other stockholders holding from one to thirty-five shares of stock each, and all of which had paid $100 per share for their stock, whether preferred or common.

In pursuance of the agreement between John W. Shaffer and J. A. Thompson, two important contracts were drawn up and executed. One was a contract between Iowa-Wisconsin Bridge Company and John W. Shaffer & Company for construction of the substructure of the bridge. It was executed on behalf of the Bridge Company by J. A. Thompson, president, and on behalf of the John W. Shaffer & Company by John W. Shaffer, president. It bore date November 12, 1930. The other contract, although a part of

the same agreement, bears date November 10, 1930, two days previous to the substructure contract, and was between Phoenix Finance System, Inc., first party, John W. Shaffer & Company, second party, and Iowa-Wisconsin Bridge Company, third party. Phoenix Finance System, Inc., executed by John A. Thompson, president. John W. Shaffer & Company executed by John W. Shaffer, president. Iowa-Wisconsin Bridge Company executed by E. W. O'Connor, chairman of the board. O'Connor testified that he executed on behalf of the Bridge Company because it wouldn't look well for J. A. Thompson to sign both as president of the Phoenix Finance System, Inc., and as president of the Bridge Company.

The first contract above mentioned provides in substance that the contractor was to erect the bridge in ac- [fol. 35] cordance with the plans and specifications, and that the owner in consideration thereof agrees to pay the contractor an amount equal to $10,000. cash, and 3200 shares of the capital stock of the Iowa-Wisconsin Bridge Company in hand paid, receipt of which is acknowledged by the contractor. Contractor agrees to furnish a surety bond for the performance of the contract, the expense of the same to be paid by the owner.

The second contract above mentioned provides that "in consideration of one hundred forty (140) shares stock of the Iowa-Wisconsin Bridge Company in hand, paid by Third party, receipt of which is hereby acknowledged by First party and in consideration of the premises and provisions of this agreement, the First party does hereby agree to and by other endorsements does guarantee the cash payments required to be paid by the Second party to McClintic Marshall Co. of Pittsburg and Industrial Contracting Company of Minneapolis according to contracts with said companies providing for work and material to build the Black Hawk Bridge at Lansing, Iowa." It may be here stated that on numerous occasions and in numerous documents the bridge is referred to as Black Hawk Bridge, Iowa-Wisconsin Bridge, and Lansing Bridge interchangeably. The contract further provides: "In consideration of the premises and the values accruing to Second party from said guarantees by First party, the Second party hereby

agrees to meet and pay promptly when due all payments guaranteed by First party and Second party further agrees that it will pay on demand to First party any sums First party may be required to advance by reason of any of the endorsements or guarantees in connection with the building of the said Black Hawk Bridge." And the contract further provides: "In consideration of the premises and the benefits to Third party, by reason of any endorsements or guarantees of First party, the Third party hereby agrees that in event Second party fails to pay and discharge all of the payents aforesaid and/or first party is required to [fol. 36] advance any sums of money by reason of any endorsement or guarantee in connection with the financing of the said Black Hawk Bridge then and in that event the Third party agrees to pay First party on demand a sum equal to the total amount due tc First party from all causes in connection with said financing of said bridge.

"It is agreed by all parties hereto that in addition to the principal sum, interest at the rate of 8% per annum will accrue and be payable upon and with all sums remaining unpaid to First party after March 1st, 1931, and that all sums advanced by First party hereunder shall become payable to First party on demand."

Said contract further provides: "Second party agrees to provide a Standard Completion Bond guaranteeing completion of the Bridge, Premium to be paid by First party."

Said contract further provides: "Third party agrees that First party may take over possession of and control of the Black Hawk Bridge and all work and management of all things in connection therewith at any time during any default of or any failure of Third party to promptly meet any payments herein required of it to be made and that First party may have and hold said Bridge and all things belonging thereto until said sums are paid in full as required hereunder."

The above contract is peculiar when it is primarily supposed to be made for the benefit of the owner and to enable the principal contractor to perform his agreement. The furnishing of a surety bond was waived and never furnished, and by the terms of this contract the owner is first made to

deliver to the guarantor 140 shares of stock at an agreed valuation of $14,000. (the valuation is shown elsewhere in the record) as compensation to the guarantor to guarantee the contractor, and then to follow with the provision that the owner shall guarantee the guarantor.

[fol. 37] After the two foregoing contracts were concluded a third contract called a "Stated Settlement Agreement" was executed on November 26, 1930, between Standard Shares Holding Company by John W. Shaffer, and Iowa-Wisconsin Bridge Company, by J. A. Thompson. Under the provisions of this agreement it is recited that the trustee (Standard Shares Holding Company) had sold for the account of the Bridge Company, 1892½ shares Class A stock, and 1617 shares Class B stock, for the total sum of $350,950. The trustee relinquishes all right, title and interest which it may have except 1500 shares Class B stock, and agrees that it owes the Bridge Company $17,659.69, which was to be paid before November 25, 1930. All other assets of the Bridge Company were to be surrendered by the Standard Shares Holding Company. There was turned over assets at that time from which the Bridge Company realized in cash approximately $80,000.

Shortly after the execution of such contract John W. Shaffer & Company sold the 3200 shares of stock which it received under the construction contract, to Thompson & Company for $224,000 for which Thompson & Company gave its note. Under these arrangements and while the Bridge Company was under the control of J. A. Thompson and Phoenix Finance System, Inc., construction progressed under the sub-contracts. As Shaffer needed money from time to time to pay sub-contractors, Thompson & Company made payments on its note and it in the meantime was selling stock at $100. per share. There is no claim that Thompson & Company did not eventually pay the entire face of the note. In the meantime the Bridge Company was collecting very considerable sums of money on the assets turned over by the Standard Shares Holding Company, and as stated, eventually collected about $80,000.00.

On the 10th day of March, 1931, a meeting of the board of directors of the Bridge Company was held. Officers were

elected, Vernon W. O'Connor, Chairman of the Board, John A. Thompson, President, A. B. Wilder, Vice-Presi-[fol. 38] dent, Thomas H. Bakewell, Vice-President, Oscar R. Thorson, Secretary-Treasurer. The record then recites: "The President stated that sufficient funds had not been received from the sale of stock to properly finance the completion of the Black Hawk Bridge," and the following resolution was adopted:

"Whereas, the funds received from the sales of stock of this corporation have been inadequate to properly finance the rapid completion of the Black Hawk Bridge, and

"Whereas, it is deemed by this Board expedient and advisable and to the best interests of this corporation not to delay the construction of this bridge through the shortage of finances, and

"Whereas, it is possible to borrow Fifty Thousand Dollars ($50,000.00) for these purposes,

"Therefore, Be It Resolved, that the Vice-President, A. B. Wilder, and the Secretary, Oscar R. Thorson, be and they are hereby authorized and instructed to negotiate a loan of Fifty Thousand Dollars ($50,000.00) from the Phoenix Finance System, Inc., payable six months from date, with interest from date at eight per-cent (8%) per annum and to execute for and on behalf of this corporation proper papers pledging all of the real and personal property of the Iowa-Wisconsin Bridge Company for the payment and satisfaction of said loan, and to sign such note, agreement or pledge, and to all things as is in their judgment necessary to accomplish this loan and to see that the loan is properly taken care of at maturity, and this Board of Directors hereby goes on record as pledging all of the assets of the Iowa-Wisconsin Bridge Company to the Phoenix Finance System, Inc., for the full and complete payment and satisfaction of all of the obligations and debts of the Iowa-Wisconsin Bridge Company to said Phoenix Finance System, Inc., as they may fall due."

[fol. 39] The Bridge Company having paid in full for the construction of the bridge, it is not shown why any insufficiency of funds concerned it. In any event, the mortgage was duly executed and delivered and entries made in the

books as though $50,000 had been received by the Bridge Company and disbursed, but in fact no such payment had been made. In this connection certain checks were drawn, one by Phoenix Finance System, Inc., for $35,000. payable to Iowa-Wisconsin Bridge Company, which was immediately endorsed by The Iowa-Wisconsin Bridge Company "Pay to the order of John W. Shaffer & Company." Shaffer & Company immediately endorsed the check over to Thompson & Company and Thompson & Company endorsed it back to Phoenix Finance System, Inc., the original drawer of the check. The memory of those handling this check was exceedingly dim on the taking of testimony, and it was not explained why the check was drawn or what purpose it subserved. No such sum was needed by the Bridge Company, and there is no showing that it paid any debts as such check passed through the circuit. Another check of $15,000 was drawn by Phoenix Finance System, Inc., by J. A. Thompson, President, payable to Iowa-Wisconsin Bridge Company. It likewise made a circuit under appropriate endorsements to its original drawer, Phoenix Finance System, Inc. No obligations were paid by either of these checks, but they were supposed to have offset the $50,000 mortgage. This mortgage was authorized March 10, 1931, and formally executed on the same day.

John A. Thompson, Phoenix Finance System, Inc., and Thompson & Company had been during the preceding winter urging the sales of stock in the Bridge Company held by Thompson & Company, and were in negotiation with Elliott-Rodgerson Company of Minneapolis, endeavoring to enlist that concern to undertake the sale of the Bridge Company's stock. On February 5, 1931, Phoenix Finance System, Inc., by J. A. Thompson, President, wrote a letter to Elliott-Rodgerson Company, Minneapolis, Minnesota, in which he very elaborately assures that concern with statements of fact and many figures, demonstrating a finan- [fol. 40] cial situation entirely adequate to complete the bridge. Rodgerson was a witness and testified that Thompson assured him that $750,000 would be the entire capitalization, and that no mortgage would be placed upon the bridge. A large number of stockholders gave testimony to the effect that they bought upon the representation that the bridge would be entirely unencumbered. Elliott-Rodg-

erson Company under Thompson's representations, sold considerable stock, all stock being sold at $100 per share. Construction progressed and the bridge was completed and opened on June 17, 1931.

After the opening of the bridge a number of directors' meetings were held devoted to the management of the property. On October 23, 1931, a directors' meeting was held at which the purpose of the meeting was presented to the effect that there was still to be paid for the completion of the bridge, approximately $40,000., and that the corporation was threatened with suit by certain creditors (unnamed); that since the Company had no funds it will be necessary to borrow some in some manner. After discussion the meeting was adjourned without action to Monday, October 26, 1931. On October 26, 1931, the meeting reconvened, the purpose of the meeting was again announced, and it was suggested by Mr. Wagner, a director, that a bond issue could probably be obtained for six per cent. There was general discussion but no action, and the meeting adjourned to meet at Des Moines, November 2, 1931. On November 2nd the meeting convened without a quorum and adjourned, convened on November 5th without a quorum and adjourned, and reconvened on November 10th a quorum being present, J. A. Thompson, President, presiding. At this meeting a resolution was presented reciting the existence of the $50,000 mortgage and default in its payment when due; that there was $12,000 due McClintic-Marshall Corporation; $13,000 due Kremer & Hogg; and that the Phoenix Finance System, Inc., had recently advanced to Industrial Contracting Company $10,000., and other additional obligations aggregating approximately $40,000., [fol. 41] and after numerous recitals of financial embarrassment, winding up with a proposal to effect a bond issue of $200,000. and the execution of a mortgage deed of trust to secure the same for the alleged purpose of refinancing the needs of the bridge company. A resolution was unanimously adopted with authority for the president and secretary to employ legal counsel and cause to be prepared the mortgage deed of trust and the bond issue. Then followed a series of additional resolutions authorizing the issue of

bonds to take up the claims of Kremer & Hogg, McClintic-Marshall Corporation, and the $50,000 mortgage to Phoenix Finance System, Inc.

On December 22, 1931, a special meeting of the stockholders was called at which the Thompson forces controlled 2273 shares, mostly by proxy, and the bond issue carried at the directors' meeting was in form approved, there being 335 scattered votes against the resolution.

Having completed the formalities of the issuance of $200,000. in bonds, the next step appears to have been to distribute them. At a meeting of the board of directors held March 7, 1932, at which were present the following directors: J. A. Thompson, President, M. K. Thompson, wife of J. A. Thompson, Emory H. English, officer of Phoenix Finance System, Inc., and later a director and officer of Phoenix Finance Corporation, A. B. Wilder, Vice President of Phoenix Finance System, Inc., and later of Phoenix Finance Corporation, Oscar R. Thorson, an employee of the Thompson concerns, and H. T. Wagner. A resolution was adopted disposing of most of the bonds. $97,000 in bonds were awarded to Phoenix Finance System, Inc., in liquidation of the $97,000 aggregate of items referred to in the Master's report and $9,000 only of which the Master found to be based upon a consideration to the Bridge Company. The resolution then continues as follows:

[fol. 42] "Whereas, it has heretofore been ordered by the Board of Directors that the Company re-purchase from Phoenix Finance System, Inc. 517 shares of Class "A" Preferred Stock of the company for a consideration of $51,700.00 plus interest at the rate of 6% per annum, from January 1, 1931 to January 31, 1932, in the amount of $3360.50., or a total of $55,060.50, and by reason of the fact that the corporation is without funds with which to pay the same, and for the further reason that it is impossible to sell or dispose of said bonds at this time, that there be delivered to the said Phoenix Finance System, Inc., Series "B" bonds of the company in sufficient amount to cover the same on a basis of an 8% yield to the said Phoenix Finance System, Inc., and

"Whereas, on that basis Phoenix Finance System, Inc. will be entitled to bonds in the aggregate face amount of $60,609.86."

The resolution then awards Phoenix Finance System, Inc., $60,500 of the bonds. It will be here noted that 517 shares of Class A stock were purchased by Thompson & Company and thereafter transferred to Phoenix Finance System, Inc., at seventy cents on the dollar. So in this transaction there was to be a clean profit to the Phoenix concerns of $18,870.50, were we to assume that the Bridge Company had any power to repurchase these shares.

The resolution then authorizes the delivery of $7,400 of bonds in adjustment of an alleged claim made by Helmer N. Anderson. Later $10,000 in bonds were pledged to the law firm of Bradshaw, Schenk and Fowler to secure $4,000 attorneys fees. Five $1,000 bonds were awarded to five certain claimants referred to in the Master's Report and found to be upon adequate consideration and valid. The remaining bonds, the Master says "approximating $19,000.00 or $20,000.00," but which would be exactly $20,100., were issued to the Phoenix Finance Corporation as se- [fol. 43] curity for a note of $3,125., given to evidence the payment of that amount by Phoenix Finance Corporation on behalf of the Bridge Company in payment of taxes.

It is proper to say at this point that about the time of the distribution of these bonds or shortly thereafter the Phoenix Finance System, Inc., was liquidated by the simple process of creating a new corporation called the Phoenix Finance Corporation, officered by the same officers as the old one and transferring all of the assets of the old corporation to the new one. The new corporation, created and officered by the same individuals, took over the entire fruits of the activities of the old, so far as concerns this case, and proceeded to carry on with the same notice and purpose, adopting all of the plans and results of its predecessor.

Counsel for plaintiffs—both the Trustees and Phoenix Finance Corporation—have in argument, both oral and in writing, stressed greatly a particular matter which they have injected into the situation in connection with their

exceptions to the Master's Report. After the coming in of the Report plaintiffs caused an examination of the books of the Bridge Company, Standard Shares Holding Company, and certain other documents, some of which were not even in evidence, by Ernst & Ernst, a firm of certified public accountants, and attached the report of such accountants to their exceptions. It is claimed for this report that it points out sufficient matters in the record of this case to demonstrate the erroneous character of the Master's findings and conclusions. I cannot give to this document—accepting the same as a part of counsel's brief—the effect claimed for it. The issue which was clearly and sharply drawn was whether the books and accounts of the Bridge Company, kept under the supervision of Standard Shares Holding Company and Phoenix Finance Corporation, spoke the truth, or whether they were false and largely fictitious. Touching this issue the Ernst & Ernst [fol. 44] report is nothing short of a petitio principii. The accountants in the report simply attempt to prove the truthfulness of the books and accounts by resorting to the books and accounts themselves. The accountants frankly say that they made no audit and did not attempt to verify the figures by resource to other sources. In these circumstances I do not see how any weight can be given to the report, even though it were to be considered as a part of the record.

After a careful and laborious examination of the record in this case, I am of opinion that the evidence amply supports the findings of the Master. I am also of the opinion that as applied to the issues and the evidence the Master's conclusions of law are sound and supported by the authorities cited, with some comparatively minor exceptions which I will now deal with.

The Master found that $10,000. in bonds were pledged to Bradshaw, Schenk and Fowler to secure two notes aggregating $4,000., and that these bonds are valid to the extent necessary to liquidate the $4,000 and interest, as having been based upon a consideration to the Bridge Company. The Master's language in subdivisions (h) and (j) of Finding 10, is slightly ambiguous and confusing, but taken as a whole the meaning is clear. The defendant and

interveners' seventh exception is probably technically well taken. These items, however, will be dealt with in a group of other items which I think will do justice to the pledgees.

The Master in conclusion of Law 5 says: "That under the facts above found, it is apparent as a matter of law that the complainants did not furnish the necessary proof to sustain the validity of the bonds, except the bonds specifically named in paragraph ten of the findings of fact, and the prima facie showing made in the first instance by the complainants has been overcome by evidence of the defendant and interveners except as to those bonds especially named as having consideration in paragraph ten of the findings of fact, and all the said bonds not named in [fol. 45] said paragraph ten of the findings of fact as having a consideration, are illegal and void because they were issued fraudulently." This conclusion of law is attacked in the defendant and interveners' eighth exception. I think that in so far as the language of the Master's conclusion includes the $9,000. of bonds held valid in the hands of the Phoenix Finance Corporation, and the $3,125. in bonds held valid in the hands of the Phoenix Finance Corporation, it is erroneous. What I have said with respect to the legal status of the Phoenix Finance Corporation as the successor of Phoenix Finance System, Inc., places it completely upon a level with its predecessor so far as equities are concerned. With full notice it has adopted everything its predecessor did, and with full notice that its predecessor had at the outset taken 140 shares of stock of the Bridge Company without paying any subscription price therefor and has not accounted for it. I see no reason why a court of equity in this particular instance should not observe the well recognized equitable maxim that "he who hath done iniquity shall not have equity." The allowance of these items would increase the encumbrance to be sustained by the decree to a point where a sale of the bridge could not be avoided. This consideration should not be awarded the plaintiffs at the sacrifice which it would entail.

In view of the conclusions of the Court a decree should be entered overruling the exceptions of the plaintiff trustees, numbered one to eight inclusive, and of Phoenix Fi-

nance Corporation, numbered one to six inclusive, and exceptions reserved to the respective plaintiffs. Defendant and interveners' exceptions one, two, five and ten having been withdrawn, will not be further noticed. The decree should overrule defendant and interveners' exceptions numbered three, four, six and seven, with exceptions reserved to the defendant and interveners, and sustain de-
[fol. 46] fendant and interveners' exceptions numbered eight, nine and eleven, with exceptions reserved to the plaintiffs.

With elimination of the $9,000 item and the $3,125. item allowed the plaintiffs by the Master, there remains $15,000 of a charge against the mortgaged property to be protected. This sum is the aggregate of $4,000 due Bradshaw, Schenk and Fowler, $6,000 due Helmer N. Anderson and $1,000 each due Laura B. Baker, J. W. Dempsey, Lyle Sign Company, M. B. Stone, and Cobb, Hoke Benson, Krause and Faegre, or their respective assigns. None of these creditors and holders of bonds are shown to be holders of bonds in due course, but the Master was of opinion, and the Court approves his conclusion, that equity should be done in these circumstances to the extent possible without doing greater injustice to the defendant and interveners. I think a foreclosure of the deed of trust in this case should be denied, because the trust deed and all of the bonds, with the exception of those held by the seven creditors named, are tainted with fraud. And as to those creditors, or their authoritative assigns, equity can be done by a provision of the decree sequestering all earnings and revenues of the Bridge Company over and above such as may be absolutely necessary to pay maintenance, operating expenses and taxes, and retaining the property in receivership until these obligations, with interest, are fully paid; with the option of course to the defendant and interveners to refund this indebtedness in some other manner.

I am of opinion that the entire costs in this case should be assessed to the plaintiffs, and the decree should so provide.

GEO. C. SCOTT,
United States District Judge.

Filed in the District Court December 1, 1936."

[fol. 47] Exhibit "B".

Findings of Fact by the Court.

United States District Court, Northern District of Iowa, Eastern Division.

Bechtel Trust Company, and A. H. Schubert, Trustees, Plaintiffs,
No. 220. vs. In Equity.
Iowa-Wisconsin Bridge Company, Defendant,

Fayette D. Kendrick, et al., Interveners.

The Master in his Report found the facts as follows, which findings the Court approves and adopts, with the exception of that part of Findings Nos. 8 and 9, and subdivision (a) of Finding No. 10, pertaining to the $9,000 item paid Kramer & Hogg, which the Master finds the Bridge Company received consideration for, and in that connection reduces the $97,000. aggregate to $88,000; and also with the exception of subdivision (i) and (k) of Finding No. 10, wherein the Master finds that $3,125. of the bonds pledged to Phoenix Finance Corporation, were issued upon a consideration to the Bridge Company:

"1. That on the 20th day of February, 1932, a deed of trust was issued by the defendant, Bridge Company, dated as of the first day of January, 1932, to secure a bond issue of $200,000.00 and the complainants are now the trustees under said deed of trust.

"2. That as of January 1, 1932, the said Bridge Company purported to authorize the issuance, under said trust deed, of bonds in the amount of $200,000.00, and that bonds in such amount were issued by the Bridge Company.

"3. That the principal on the said bonds, together with interest and taxes, as alleged in the complaint, are in default.

"4. (a) That John A. Thompson, above named, before [fol. 48] the issuance of the said bonds and before the authorization of the said trust deed, came into the control and management of the defendant, Bridge Company, either directly or through the stnadard Shares Holding Company.

"(b) That during all that time and during the times hereinafter named, the said Thompson also controlled the Phoenix Finance System, Inc., and other affiliated companies.

"5. That while the Articles of Incorporation of the Bridge Company contain the provisions set forth in paragraph seven of the interveners' petition of intervention, the Bridge Company, through the influence of the said Thompson and his associates, caused $60,500.00 of the said bonds to be issued to the said Thompson, or to the said Phoenix Finance System, Inc., or affiliated companies in exchange for Class A stock then held by the said Thompson or his owned and controlled institutions. When that was done, there was outstanding other Class A stock held by other stockholders who were not given the permission or opportunity by the Bridge Company, as was the said Thompson and his affiliated companies, to surrender such Class A stock and receive bonds, as did the said Thompson and his institutions. That no notice of the intention of the corporation to redeem said Class A shares was mailed or given to holders of such stock, as required by said paragraph seven of the Articles of Incorporation, except to the said Thompson and his controlled companies. That in other words, all of the said Class A stock was not purchased by the Bridge Company at said time through the issuance of the said bonds or otherwise; nor was a portion of the said Class A stock redeemed proportionately, as provided by the Articles of Incorporation set forth in paragraph seven of the petition of intervention. And at said time the said Class A stock was thus surrendered by the said Thompson without notice to other similar stockholders of such transaction, and that such transaction took place without a legal authorizing vote on the part of the stockholders or directors of the Bridge Company. That [fol. 49] so far as Thompson and his associates were concerned, they were voting under the influence of Thompson, but so far as independent stockholders and directors were concerned they did not know the true facts when they voted for the pretended authorizing resolution.

"6. That during all the times material there was in effect in the State of Delaware a statute, as set forth in paragraph eight of the petition of intervention. That when

the said Thompson and his companies exchanged the said Class A stock for the said bonds in the amount of approximately $60,500.00, such action caused an impairment of the capital of the corporation, in violation of the said Delaware statute.

"7. That the action of the said Thompson, in promoting the said exchange of Class A stock for the said bonds, was fraudulent and for the purpose of conferring upon himself a preference over other holders of Class A stock. That by thus conspiring and acting fraudulently, the said Thompson did acquire a preference over other holders of such Class A stock.

"8. That $97,000.00 of the said bonds were transferred by the corporation to the said Thompson, or his controlled companies on a pretended book account originating out of a pretended mortgage of $50,000. covering an obligation for which J. W. Shaffer & Company already was duty-bound to perform in constructing the superstructure of the bridge, with the exception of an item amounting to $9,000.00 paid to Kramer & Hogg to settle a claim based upon a mechanic's lien. That although the contract between the Bridge Company and the said Shaffer & Company provided for a surety bond to insure the obligation of the said Shaffer & Company, yet the said Thompson, in manipulating and scheming and conspiring, omitted having the said Shaffer & Company furnish such bond, and that under the pretended omission of the said Shaffer & Company to furnish such bond, the said John A. Thompson, through his controlled companies, pretended to perform [fol. 50] the obligation which the said Shaffer & Company should have performed. That the said Thompson and his companies did not, in fact, perform such obligation on behalf of the said Shaffer & Company, but simply built up a pretense on the books of the various companies to make it falsely appear that the said Shaffer & Company failed to perform its duty, and that the said Thompson, or his controlled companies expended the said $97,000.00 in so doing. But, as a matter of fact, the said Thompson and his controlled companies did not thus expend $97,000.00, but only expended the said $9,000.00 thereof paid to the said Kramer & Hogg, as aforesaid, and therefore there was no consideration for $88,000.00 of the said $97,000.00 of the

Bridge Company bonds thus issued to the said Thompson or to his controlled companies; but there was consideration for the said $9,000.00 of the said bonds thus issued on the said Kramer & Hogg claim. That the said pretense and scheme on the part of the said Thompson was for the purpose of obtaining $88,000.00 of the said $97,000.00 of the said bonds without consideration.

"9. That the resolutions pretended to have been passed by the Bridge Company authorizing the said $97,000.00 issue of the said bonds were not genuine, legal resolutions so far as the same related to the said $88,000.00 of the said bonds, but such resolutions relating to the said $88,000.00 of the said bonds were adopted through the influence and connivance of the said Thompson and his associates, so far as the said Thompson and said associates were concerned. Independent directors and stockholders who supported such resolution did so not knowing of the true facts relating thereto, but such independent stockholders and directors were deceived and misled by the representations of said Thompson. That in truth and in fact, such resolutions were invalid and of no effect.

"10. (a) That of the bonds above named, the Bridge [fol. 51] Company received full consideration for the said $9,000 thereof issued to Kramer & Hogg in settlement of a mechanic's lien claim.

"(b) That of the remaining bonds $7,400.00 thereof were issued to Helmer N. Anderson for a consideration to the Bridge Company of $6,000.00, in consideration of the purchase of a leasehold and other interest in real estate belonging to the Bridge Company. So, to the extent only of the said $6,000.00 did the Bridge Company receive consideration in this transaction.

"(c) That of the remaining bonds, the $1,000.00 thereof issued to Laura B. Baker in compromise settlement of a suit against the Bridge Company was based upon a consideration received by the Bridge Company in that amount.

"(d) That of the remaining bonds, the $1,000.00 thereof issued to J. W. Dempsey in compromise settlement of a general claim against the corporation was based upon a consideration received by the Bridge Company in that amount.

"(e) That of the remaining bonds, the $1,000.00 thereof issued to the Lyle Sign Company in compromise settlement of a disputed account for road signs was based upon a consideration received by the bridge company in that amount.

"(f) That of the remaining bonds, the $1,000 thereof issued to M. B. Stone, an engineer of Minneapolis, Minnesota, in compromise and release of a mechanic's lien claim against the corporation was based upon a consideration received by the Bridge Company in that amount.

"(g) That of the remaining bonds, the $1,000.00 thereof issued to Cobb, Hoke, Benson, Krause, and Faegre, attorneys of Minneapolis, Minnesota, in full compromise and settlement of a claim for legal services against the Bridge Company was based upon a consideration received by the Bridge Company in that amount.

"(h) That of the remaining bonds, $10,000.00 thereof were issued to Bradshaw, Schenk & Fowler, attorneys at [fol. 52] law, as security for two notes given by the Bridge Company to the said Bradshaw, Schenk & Fowler in the aggregate amount of $4,000 and to the extent of the principal of, and interest on, the said notes, the corporation received consideration for the said bonds, and to that extent only the said bonds are valid.

"(i) That the remaining bonds, approximating $19,000 or $20,000, were issued to the Phoenix Finance Corporation as security for a note of $3,125.00 given in part to secure the payment of that amount made by the said Phoenix Corporation on behalf of the Bridge Company to pay taxes of the Bridge Company in the State of Wisconsin. That to the extent of the principal of, and interest on, the said note only the said bonds are valid, but to no other extent are these particular bonds valid.

"(j) That of the bonds above named, held by Bradshaw, Schenk & Fowler in the amount of approximately $6,000.00 not necessary to secure the said notes aggregating $4,000.00 and interest are without consideration and invalid.

"(k) That of the bonds above named issued to the Phoenix Finance Corporation to secure the said note of $3,125.00, the amount of bonds not necessary for such se-

curity, approximating the sum of $16,975.00, are without consideration, obtained by fraud, and invalid.

11. That the said Thompson, speaking for himself and the Phoenix Finance System, Inc., and his other affiliated institutions, admitted that he and the said institutions owned at least ninety per cent of the total $200,000 bond issue, and now hold the same.

"12. That as alleged in paragraph 18 of the petition of intervention, any demand before the commencement of this suit that might have been made by the interveners to obtain relief from the issuance of the said bonds from and through the said defendant corporation would have been unavailing.

[fol. 53] "13. That the Bridge Company was not making, and would not have made, a good faith defense to the complainants' action had not the interveners intervened. That while attorneys Haehlen and Hart were conscientious in their efforts and took the part of faithful and capable lawyers in the litigation, yet they were so handicapped by the corporation, as is indicated by the evidence, that they could not have successfully defended without the interveners.

"14. That the interveners and the defendant are not estopped from making their defense. This is true because the purported ratification and estoppel claimed by the complainants in their reply was brought about through the same connivance and control of the said Thompson as was the original conspiracy and fraud, and that so far as the independent stockholders and directors are concerned, they did not know of the fraud and conspiracy when taking any action that might otherwise amount to estoppel or ratification."

The defendant and interveners have proposed and asked that the Master's findings as approved by the Court, be amplified by additional findings, and the Court being of opinion that the proposed additional findings are supported by the evidence, finds the facts requested as follows:

1. That First Trust & Savings Bank is now and at all times herein mentioned has been a corporation duly organized and existing under and by virtue of the laws of the

State of Iowa, with its principal place of business in the City of Davenport in said State, and is a citizen and resident of the State of Iowa. That said First Trust & Savings Bank is the successor of Bechtel Trust Company, as trustee in the mortgage deed of trust hereinafter referred to.

2. That the defendant, Iowa-Wisconsin Bridge Company, is now and at all times herein mentioned has been a [fol. 54] corporation duly organized and existing under and by virtue of the laws of the State of Delaware, with its principal office in the City of Wilmington in said State, and is a citizen and resident of said State; and that it is and has been at all times herein mentioned duly authorized to transact business in the states of Iowa and Wisconsin.

3. That the intervener, Fayette D. Kendrick, is a citizen and resident of the state of Minnesota and is and has been since December 15, 1930, a stockholder of the defendant corporation, Iowa-Wisconsin Bridge Company. That his petition in intervention in the above entitled action was filed by leave of court first had, and was on behalf of himself and all other stockholders similarly situated.

4. That the interveners, Warren G. Hayes, T. H. Bakewell and Anna W. Schuster, are citizens and residents of the State of Iowa, and the intervener, Ernest W. Haverland, a citizen and resident of the State of Minnesota; that each of them is and prior to the acts complained of in the petition of intervention was a stockholder of the defendant corporation, Iowa-Wisconsin Bridge Company. That their petition in intervention in the above entitled action was filed by leave of Court first had, and was on behalf of themselves and all other stockholders similarly situated.

5. That this controversy when commenced was wholly between citizens of different states and the jurisdiction of the Court was based upon diversity of citizenship.

6. That the matter in controversy, exclusive of interest and costs, exceeds the sum or value of $3,000.

7. That on or about February 20, 1932, the officers of the Iowa-Wisconsin Bridge Company executed and delivered to Bechtel Trust Company and A. H. Schubert as Trustees, a mortgage deed of trust, dated as of January 1, 1932, wherein said Iowa-Wisconsin Bridge Company, as

mortgagor, for the purpose of securing the payment of the [fol. 55] $200,000 of bonds in these findings referred to, purported to mortgage to Bechtel Trust Company and A. H. Schubert as Trustees, the real and personal property of said Iowa-Wisconsin Bridge Company in the States of Iowa and Wisconsin, which property is fully described in said mortgage deed of trust, as recorded, to which reference is hereby made. That said mortgage deed of trust was recorded in Allamakee County, Iowa, on February 26, 1932, at 1:20 o'clock P. M., as a mortgage of city, town and village lots, and as a mortgage of lands other than city, town and village lots, and as a chattel mortgage, and recorded in Book 52 of Land Mortgages on page 259 of the records of said Allamakee County, and was also filed for record in Crawford County, State of Wisconsin, on the 27th day of February, 1932, at 8:30 o'clock A. M., and recorded in Volume 136 of D. page 500 of the records of said Crawford County. That wherever in these findings a deed of trust of the Bridge Company is referred to, reference is had to the mortgage deed of trust last above described, and the bonds referred to in these findings are those described in said mortgage deed of trust.

8. That Phoenix Finance Corporation, complainant and defendant to petition in intervention, is the successor in interest of Phoenix Finance System, Inc., and subject to all defenses and offsets to which said Phoenix Finance System, Inc., was at any time subject.

9. That this action was instituted by the plaintiffs herein as trustees upon the demand of Phoenix Finance Corporation, as owners and holders of $177,600 of the $200,000 of the bonds involved herein.

That said Phoenix Finance Corporation referred to agreed to secure and indemnify said trustees against all costs, expenses and liabilities incurred by them in taking the action demanded; and also designated the attorneys to be employed by the trustees, and agreed to save the trus- [fol. 56] tees harmless on account of any claim by said attorneys for fees and expenses in connection with the litigation.

10. That the Lansing Bridge Company, a Delaware corporation, was organized on or about March 20, 1928, to con-

struct and operate a bridge across the Mississippi River from Lansing, Iowa, eastward to the Wisconsin shore. On or about June 11, 1928, the name of the Bridge company was changed to Iowa-Wisconsin Bridge Company.

On or about March 10, 1928, the United States Congress authorized the Bridge Company to construct a toll bridge across the Mississippi River from Lansing, Iowa, to De Soto, Wisconsin.

Originally, the stock of the Bridge Company consisted of five thousand shares of no par value, but later, the capital stock was changed by dividing the stock into common and preferred stock, as follows: Five thousand shares of no par value common stock, and fifteen hundred shares of preferred stock, at $100. per share par. Later, the capital stock was again changed to four thousand shares of preferred stock, $100 par value, known as Class A stock, and six thousand shares common no par Class B stock. August 23, 1930, the Articles again were amended so that the preferred, or Class A stock, was fixed at thirty-seven hundred fifty shares of $100. par value per share, and thirty-seven hundred fifty shares of common Class B stock without par value.

11. That the articles, as amended, provided that if less than all shares of Class A stock were redeemed, the selection of shares to be redeemed must be made by lot or pro rata and that thirty days written notice of intention to redeem must be mailed to holders of record of the stock to be redeemed.

12. That at all times involved in this action the statutes of Delaware provided that no corporation should use its funds or property to purchase its own stock, when such use [fol. 57] would impair the capital of the corporation.

13. The bridge was originally promoted in 1929 by certain Lansing, Iowa, residents who engaged V. W. O'Connor and John W. Shaffer of Minneapolis, Minnesota, as promoters of the Bridge Company.

14. John W. Shaffer owned all of the stock of the Standard Shares Holding Company, except qualifying shares of other directors, and also owned all of the stock of John W. Shaffer & Company, except directors' qualify-

ing shares. John W. Shaffer and Vernon O'Connor as promoters of the Bridge Company acted through the medium of the Standard Shares Holding Company and John W. Shaffer & Company.

15. The Standard Shares Holding Company became and was trustee of the Iowa-Wisconsin Bridge Company in the sale of the Bridge Company stock and in construction of the bridge. On October 26, 1929, a contract was made between the Iowa-Wisconsin Bridge Company and Standard Shares Holding Company, by which the latter was designated as trustee of the Bridge Company. Under this contract the trustee was to proceed with the construction of the bridge, the cost of which should not exceed $600,000. It was agreed that the Bridge Company should have a gross capitalization of 4000 shares of Class A stock, par value $100. per share and 6000 shares no par value Class B stock.

While the Standard Shares Holding Company thus acted as trustee, it held a majority of the outstanding voting stock of the Bridge Company.

16. On November 9, 1929, a contract was made between John W. Shaffer and the Bridge Company, employing Shaffer as engineer of the bridge project, for ten per cent of the total construction cost. This contract was assigned to John W. Shaffer & Company, April 4, 1930.

17. On December 7, 1929, Standard Shares Holding [fol. 58] Company as trustee for the Bridge Company, acting by J. W. Shaffer, entered into a contract for grading with V. W. O'Connor, the partner and co-promoter of John W. Shaffer, at the rate of 24¢ per cubic yard of excavation. This contract was immediately sublet by O'Connor to Kramer & Hogg at 15¢ per cubic yard. On April 4, 1930, O'Connor assigned the original contract to John W. Shaffer & Company.

18. In December, 1929, Standard Shares Holding Company as trustee for the Bridge Company, acting by J. W. Shaffer, contracted with V. W. O'Connor, Shaffer's partner and co-promoter, to erect the substructure of the bridge, said contract calling for payment of a total of $193,196.80, estimates to be approved and work to be ac-

cepted by Shaffer, the engineer. The approval of this contract by the Bridge Company was signed by Shaffer as secretary of the Bridge Company. The contract was immediately sub-let by O'Connor to Industrial Contracting Company for a maximum total of $120,748. On April 4, 1930, this contract was assigned by O'Connor to John W. Shaffer & Company. The amount actually paid the subcontractor for completion of this work was $97,971.36. On April 4, 1930, when O'Connor assigned the aforesaid contracts to John W. Shaffer & Company, the Standard Shares Holding Company held 4000 shares of the voting stock of the Bridge Company out of 6441 outstanding, and at that time Shaffer resigned as secretary of the Bridge Company and his secretary M. Lockhart became secretary and O'Connor president of the Bridge Company.

19. John A. Thompson was interested in and with his wife M. K. Thompson and associates, A. B. Wilder and Emory H. English, controlled the Phoenix Finance System, Inc., and other affiliated companies. Thompson & Company was a wholly owned subsidiary of the Phoenix Finance System, Inc. M. White was John A. Thompson's secretary and an officer of Phoenix Finance System, Inc.

20. In October and November, 1930, through negotiations with John W. Shaffer and Vernon W. O'Connor, [fol. 59] John A. Thompson became president of an acquired control of the Bridge Company. At about the same time, the number of directors of the Bridge Company was increased and Thompson together with other directors of the Phoenix Finance System, Inc., became directors of the Bridge Company. From that time on, Thompson controlled the Bridge Company. At that time Thompson acquired and had full knowledge of the contents of the contracts and assignments and sub-contracts above set forth and of the relationships of the parties thereto between themselves and to the Bridge Company.

21. On November 26, 1930, a stated settlement as of October 31, 1930, was made between the Standard Shares Holding Company and the Bridge Company, under which there were delivered to the Bridge Company by its trustees,

liquid assets, such as cash, bills and accounts receivable, stocks and bonds, inventoried at $90,235.68; construction accounts representing amounts which had been paid for construction to date aggregating $183,496.90 and equipment, etc., amounting to $1,986., and commission and organization and expense accounts amounting to $75,231.08, making a total of $350,950., and there had been sold by said trustee for the account of the Bridge Company stock of the latter at $100. per share, amounting to $350,950. The settlement also provided for the return of all stock of the Bridge Company held by said trustee except 1500 shares of Class B stock, which were returned to the Bridge Company in consideration of a so-called management contract, the terms of which are immaterial in this litigation. On the $90,935. of liquid assets, there was later realized over $79,000. in cash and the Bridge Company had treasury stock in the amount of $390,050. to build its super-structure and complete its bridge. The substructure was practically complete and the sub-contractor thereof had been paid within $8200. of the total cost and the grading was well under way.

22. Under date of November 11, 1930, a contract for [fol. 60] the completion of the bridge was entered into between the Bridge Company, acting through John A. Thompson as president and John W. Shaffer & Company, which included erection of super-structure of the bridge, erection of piles and trestles over certain sloughs, erection of toll house, etc., and surfacing of roadway and whereby the Bridge Company agreed to and did pay $10,000. in cash and agreed to and did deliver 3200 shares of its capital stock at a fixed price of $320,000., to John W. Shaffer & Company, and Shaffer and Company, in said contract agreed to furnish a surety bond to insure the obligations of said Shaffer & Company. Extras were required to be ordered in writing. John W. Shaffer & Company sublet the contract for steel to McClintic-Marshall Company and the construction work to the Industrial Contracting Company.

23. In November, 1930, immediately after the issuance of said 3200 shares of stock to Shaffer & Company, the latter company sold said stock to Thompson & Company and received the promissory note of Thompson & Company for $224,000. therefor.

24. An agreement dated November 10, 1930, was executed by Phoenix Finance System, Inc., signed by John A. Thompson, president, and his wife M. K. Thompson, secretary, and by John W. Shaffer & Company, signed by John W. Shaffer, and by the Iowa-Wisconsin Bridge Company, signed by V. W. O'Connor, chairman of the board and M. E. Lockhart, secretary. At this time John A. Thompson was also president of the Bridge Company. This agreement recites a delivery to Phoenix Finance System, Inc., by the Bridge Company of 140 shares of Bridge Company stock; that Phoenix Finance System, Inc., agrees to guarantee the payments required to be made by Shaffer & Company to McClintic-Marshall & Company and Industrial Contracting Company, sub-contractors of John W. Shaffer & Company; Shaffer & Company agrees to make the payments guaranteed and to pay to Phoenix Finance System, Inc., any amounts advanced under the guaranty and the Bridge Company purports to agree that if Shaffer & Company "shall fail to pay and discharge all the payments aforesaid and/or first party (Phoenix) is required to ad- [fol. 61] vance any sums of money by reason of any endorsement or guaranty in connection with the financing of said Blackhawk Bridge," The Bridge Company shall pay Phoenix "a sum equal to the amount due first party (Phoenix) from all causes in connection with said financing of said bridge." No consideration passed to the Bridge Company for the purported undertaking on its part, the Bridge Company having paid the full consideration for the completion of the bridge and the sub-contractors having no contract with the Bridge Company, but being under contract with Shaffer & Company and the purported guaranty of the sub-contractors' contracts to Shaffer & Company, did not constitute a consideration to the Bridge Company. John A. Thompson, who was then president of the Bridge Company, dominated and controlled such company through and with his associates John W. Shaffer and V. W. O'Connor as a part of a plan and scheme. Thompson, in making said contract acted in a dual capacity, adversely to the interests of the Bridge Company and in violation of his duty as an officer thereof. V. W. O'Connor, in executing said contract as chairman of the board of directors, for the Bridge Company did so under the direction of and acting wholly in reliance on the statements and supposed fidelity and integ-

rity of Thompson without examination of the contract and without regard to the interests of the Bridge Company. The meeting of stockholders on November 26, 1930, at which said agreement is claimed to have been approved, was dominated and controlled by John A. Thompson by himself and through his associates John W. Shaffer and V. W. O'Connor. Said agreement was a fraud upon the Bridge Company and its stockholders.

That the Articles of Incorporation of the Bridge Company provided "that so long as any of the Class A stock shall be outstanding, the corporation shall not (except for the purposes of redeeming all of the Class A stock) unless with the affirmative vote or written consent of the holders of at least two-thirds in amount of the then outstanding [fol. 62] Class A stock; * * *

"(c) Guarantee the payment of obligations or stock of other corporations (except obligations of subsidiary corporations incurred in the usual course of business.)" That at said time there was Class A stock outstanding and consent was not given by affirmative vote nor in writing of the holders of stock, two-thirds in amount of such outstanding Class A stock, nor on the part of the holders of any of such Class A stock for the execution of any such contract. That Phoenix Finance System, Inc., and its president John A. Thompson, who was then also president of the Bridge Company, had full knowledge and were charged with full knowledge of said provisions in the Articles of Incorporation of the Bridge Company. That the foregoing contract was ultra vires and void.

25. That about February 5, 1931, John A. Thompson engaged Elliott-Rodgerson Company, as brokers to sell stock purchased by Thompson & Company from Shaffer & Company and personally and on behalf of Phoenix Finance System, Inc., represented to the public that there would be no mortgage or bonds placed against the bridge and said Phoenix Finance System, Inc., represented and agreed in writing signed by John A. Thompson as president that there was no funded indebtedness against the bridge and that Phoenix Finance System, Inc., had unconditionally guaranteed the payments to McClintic-Marshall Company and to Industrial Contracting Company, and had agreed to pay

for the completion of the bridge; that if all the money to be paid sub-contractors was not raised through stock sales as needed, the deficiency would be promptly supplied by Phoenix Finance System, Inc., to be repaid to it as later stock sales accumulated funds for that purpose. Thompson did not disclose any purported contract of indemnity by the Bridge Company to Phoenix Finance System, Inc., or that he had any intention of placing any mortgage on the bridge.

[fol. 63] 26. A stockholders' meeting of the Bridge Company was held March 10, 1931, which was controlled by the stock of Thompson & Company and John A. Thompson, 1310 shares and proxies held by Thompson 375 shares, a total of 1685 shares out of 2586 shares represented, at which meeting a board of directors was elected controlled by said Thompson. Following said stockholders' meeting, a directors' meeting was held attended only by Thompson directors, viz., V. W. O'Connor, John A. Thompson, A. B. Wilder and Oscar R. Thorson. At this meeting, there was passed a purported resolution providing for the issuance of a $50,000. mortgage to the Phoenix Finance System, Inc., on the properties of the Iowa-Wisconsin Bridge Company which resolution contained the false and fraudulent recital that funds received from sale of stock had been inadequate to properly finance the rapid completion of the bridge; whereas, the bridge company then had nothing to do with the sale of stock and it had delivered to J. W. Shaffer & Company $320,000 of its stock and $10,000 in cash for the completion of the bridge. That pursuant to such resolution a mortgage was executed to Phoenix Finance System, Inc., for $50,000 signed on behalf of the Bridge Company by A. B. Wilder who was then also an officer and director of said mortgage company. That in truth and in fact no indebtedness of said Bridge Company to the Phoenix Finance System, Inc. existed and the bridge company received no consideration for the execution of said mortgage; that the same was and is wholly without consideration, fraudulent and void. At said time said Thompson caused entries to be made on the books of said Bridge Company purporting to show the receipt of $50,000 in cash, whereas, in truth and in fact, said amount and no part thereof was received by the Bridge Company.

Said Thompson caused entries to be made on the books of the Bridge Company as though the following payments were made, $25,000. on sub-structure, $5,000. on grading [fol. 64] and $5,000. on engineering, when in truth and in fact, no such payments were made in any form, and also caused entries to be made on the Bridge Company's books as though the Bridge Company owed $15,000. to Thompson & Company, wholly owned subsidiary of Phoenix Finance System, Inc., when in truth and in fact there was nothing due from the Bridge Company to Thompson & Company or Phoenix Finance System, Inc., but on the contrary there was due over $3,000. from Thompson & Company to the Bridge Company and the aforesaid entries were wholly false.

27. That about the 1st of November, 1930, 140 shares of Bridge Company stock were issued to Phoenix Finance System, Inc., and the value thereof fixed at $100 per share, to-wit: $14,000. That upon the issue of such stock Phoenix Finance System, Inc., became indebted to the Bridge Company for said amount. That such amount has not been paid. That the Phoenix Finance System, Inc., disposed of such stock to the public. That thereafter John A. Thompson, then president of the Bridge Company, dominating and controlling the Bridge Company, and his associates caused the execution of a purported guaranty contract providing for the turning over to the Phoenix Finance System, Inc., such stock without payment therefor. That in such transaction John A. Thompson acted in a dual capacity as president of the Bridge Company and as president of the Phoenix Finance System, Inc., and acted in the interests of himself and his affiliated companies as against the interests of the Bridge Company and dealt with himself in such transaction. That the Bridge Company has not received consideration for the aforesaid stock and that there is due the Bridge Company on account thereof the sum of $14,000 with interest. That Thompson & Company was a wholly owned subsidiary of Phoenix Finance System, Inc., and was used as an instrumentality, conduit, adjunct and agent of the Phoenix Finance System, Inc., That items chargeable against one are also chargeable against the other.

[fol. 65] 28. That John A. Thompson on November 5, 1930, purchased 65 shares of Bridge Company stock from

the Bridge Company at $100. per share, and on the same day A. B. Wilder, also a director of the Bridge Company, purchased 10 shares of Bridge Company stock from the Bridge Company at $100. per share. That on the 31st day of December, 1930, Thompson & Company purchased 170 shares of Bridge Company stock from the Bridge Company at $100. per share. That subsequent to such purchase of stock by John A. Thompson and A. B. Wilder on the 31st day of December, 1930, the said John A. Thompson, through his dominant control of the Bridge Company, credited to Thompson & Company on the books of the Bridge Company 15% commission on all of the aforesaid stock in the sum of $3,675. That it was the duty of John A. Thompson and A. B. Wilder as directors of the Bridge Company to assist in selling stock owned by the Bridge Company. That in the selling of said stock no exceptional or extraordinary services were rendered and they were not entitled to credit for said commissions.

29. That about the 11th of March, 1931, John A. Thompson and his affiliated companies, through the dominant control of the Iowa-Wisconsin Bridge Company, caused a payment of $3,000 to be made from the funds of the Bridge Company to A. B. Wilder through the medium of checks issued to John W. Shaffer and immediately endorsed and delivered to A. B. Wilder, and $1000. thereof was then turned over to Thompson & Company by said Wilder. That the said Wilder was then an officer and director of the Phoenix Finance System, Inc., and also a director of the Bridge Company. That no resolution was passed by the stockholders or directors of the Bridge Company authorizing such payments to said Wilder nor was there any action taken or resolution passed by the Bridge Company providing for the payment of any amount to said Wilder for services nor had there been nor were there any exceptional or extraordinary services rendered by said Wilder to the Bridge Company. That no consideration passed to [fol. 66] the Bridge Company for such sums. That the said Thompson and his affiliated companies controlling the Bridge Company, so manipulated its books as to cause fictitious entries to be made thereon as though said sums were paid on approaches, when in fact no work was done on approaches for which said sums or any part thereof was

a proper payment. That payment of said amounts was a misappropriation of the Bridge Company's funds.

30. That on the 1st day of November, 1931, John A. Thompson and his affiliated companies through the exercise of dominant control of the Bridge Company turned over to the Bridge Company $5,410.85 of notes taken by Thompson & Company in the sales of Bridge Company stock owned by Thompson & Company and with which Thompson & Company held as collateral such stock sold by it. That substantially all of said notes were worthless. That said Thompson & Company took or received from the Bridge Company $5,410.85 for such notes. That in such transaction John A. Thompson acted in a dual capacity as president of the Bridge Company and as president of the Phoenix Finance System, Inc., and controlling its subsidiary Thompson & Company and acted in the interests of himself and his affiliated companies against the interests of the Bridge Company and dealt with himself in such transaction. The Bridge Company at the time of such transaction did not have any surplus from which it could purchase any of its stock.

31. That notwithstanding the alleged mortgage Thompson & Company continued to sell its bridge stock through its agents at $100. per share, on the representation that the Bridge Company had no funded debt, and concealed the fact of the existence of said mortgage from stockholders and directors of the Bridge Company.

32. That on August 6, 1931, John W. Shaffer & Company owed Industrial Contracting Company $10,000; Mc- [fol. 67] Clintic-Marshall Company $11,262.71, and to Kramer & Hogg an amount, then in dispute; Shaffer & Company also claimed to be entitled to payment for certain extra steel; certain extra labor and material, and commissions. There were also other matters in dispute between the Bridge Company and Shaffer & Company with reference to the bridge contracts. To make a complete settlement a stated settlement contract was made August 6, 1931, between the bridge company, as party of the first part, and John W. Shaffer, V. W. O'Connor, John W. Shaffer & Co., and Standard Shares Holding Company, as parties of the second part, which was executed on behalf

of the Bridge Company, by J. A. Thompson as president and which provided:

(a) That the Bridge Company transfer to the other parties to the contract 120 shares of its common stock and 80 shares of its preferred stock and certain other securities which were of the value of $2,475., and pay to Kramer & Hogg the balance due them.

(b) That the second parties (Shaffer, O'Connor, Standard Shares Holding Company and Shaffer & Company) accept such consideration "as full and complete settlement of all sums due them and/or any of them and for full satisfaction and stated settlement of any and all claims of all kinds whatsoever arising out of any contract or other relations between the parties hereto and/or pertaining in any way to said toll bridge and second parties separately and jointly hereby release said Iowa-Wisconsin Bridge Company fully and completely. Second parties hereby specifically acknowledge receipt of full payment for all engineering, designing and building of said bridge, and for all material, services and all other things pertaining to said bridge."

The Bridge Company, pursuant to this contract delivered 200 shares of its stock of the value of $20,000 and other securities of the value of $2,475.

33. That at about the same time John W. Shaffer agreed to and did turn over to Thompson of Thompson & [fol. 68] Company, and president of the Phoenix Finance System, Inc., $10,000. Of the Bridge Company stock (100 shares received by Shaffer) and Thompson and Company agreed to pay $10,000 owing to the Industrial Contracting Company and $11,262.71 owing to the McClintic-Marshall Company. Neither the Industrial Contracting Company nor the McClintic-Marshall Company had any contract with the Bridge Company, nor was the Bridge Company indebted to them in any amount.

That by the aforesaid assumption the Phoenix Finance System, Inc., through its subsidiary and instrumentality, Thompson & Company, relieved and discharged John W. Shaffer & Company from paying either of said amounts. That if there was any validity in the alleged guaranty con-

tract dated November 10, 1930, when Phoenix Finance System, Inc., through John A. Thompson and Thompson & Company, as obligee in said contract, thus released said Shaffer & Company, the Iowa-Wisconsin Bridge Company as claimed surety was released and discharged.

34. On September 24, 1931, the Industrial Contracting Company drew a sight draft on Phoenix Finance System, Inc., for the balance of $10,000. due them which Thompson & Company had agreed to pay and for which the Bridge Company was not liable. As a part of the fraudulent scheme and plan, leading up to the issuance of the bonds here involved, said John A. Thompson caused entries and deposits and withdrawals on the Bridge Company's records to be made, purporting to show that Phoenix Finance System, Inc., had advanced to the Bridge Company the sum of $10,000., and that the Bridge Company had made payment of said sight draft, and pretended thereby to show an indebtedness of $10,000. due from the Bridge Company to Phoenix Finance System, Inc., whereas, in truth and in fact, the said amount was an obligation of Thompson & Company and not of the Bridge Company, and nothing was due from the Bridge Company to Phoenix Finance System, Inc., on account thereof.

35. That on November 11, 1931, a meeting of the direc- [fol. 69] tors of the Bridge Company was held at which a majority present were dominated by John A. Thompson, as president. At this meeting it was represented by John A. Thompson that there was due the Phoenix Finance Corporation $54,000. on the purported mortgage of March 10, 1931, and $10,000. for money advanced Industrial Contracting Company; and that there was other indebtedness including a claim of McClintic-Marshall Company for $12,000. and further obligations aggregating $40,000. That at said meeting resolutions were adopted providing for a bond issue of $200,000; for a stockholders' meeting to consider the bond issue; for the delivery of bonds to pay the $50,000. mortgage; and for the payment of other alleged claims.

36. On the same date, a letter prepared at the dictation of John A. Thompson, and signed by Oscar R. Thorson, as secretary-treasurer, of the Bridge Company, under his direction was sent to the stockholders of said Bridge

Company. In said letter it was falsely and fraudulently represented to the stockholders of the Bridge Company for the purpose of inducing said stockholders to approve the proposed bond issue of $200,000., and to induce them to forward proxies to said Thompson and his associates, as follows;

(a) "That in October, 1930, negotiations were opened with Phoenix Finance System, Inc., to lend its aid in arranging for the financing of the completion of the bridge and to save the project from absolute failure.

(b) That there was an understanding that the Phoenix Finance would be repaid by the Bridge Company on demand for any such advances that might be required to be made by it temporarily in order to fulfill the guarantee and to permit the continuation of work on the bridge.

(c) That sale of stock to the public showing no improvement and in order that the work on the bridge might not be delayed, Phoenix Finance System, Inc., made substantial advances.

[fol. 70] (d) That construction of the bridge went forward without delay and the cash required for material and labor was advanced regularly by the Phoenix Finance Company.

(e) That there had been advanced by the Phoenix Finance System, Inc., to the Bridge Company in the payment of bills for labor and material to complete the bridge approximately $70,000., $50,000. of which is secured by a mortgage which was due December 10, 1931.

(f) In addition to the sum of $70,000. which has been advanced by the Phoenix Finance System, Inc., there will be immediately required the further sum of approximately $25,000. to complete payment of outstanding obligations.

(g) The board of directors was confronted with the problem of raising additional funds with which to satisfy the claims of Kramer & Hogg and McClintic-Marshall and Company in order to prevent threatened liens and litigations to collect these accounts.

(h) There was never intended that this cash advanced by Phoenix Finance System, Inc., to the Bridge Company should be of a permanent nature and it must be repaid.

That the aforesaid representations were misleading, false and fraudulent.

37. That following the aforesaid letter, notice of a proposed stockholders' meeting for December 22, 1931, with form of proxy running to Emory H. English, Oscar R. Thorson and J. H. Thompson enclosed was sent to Class B voting stockholders and the fraudulent statements contained in the letter of November 11, 1931, were not corrected, nor was any true information given with respect thereto. That said notice called for a special meeting of Class B voting common stock, to consider and authorize directors to borrow, not to exceed $200,000; to authorize the execution of mortgage bonds, not to exceed that amount, and to provide the terms and conditions under with such bonds [fol. 71] should be issued; to authorize the directors to convey to a named trustee by mortgage deed of trust all of the property and assets of the company to secure the payment of principal and interest of such bonds; to authorize the directors to sell, pledge or otherwise dispose of such bonds and to apply the proceeds thereof to such corporate purposes as the board might from time to time determine. In response to such letter of November 11, 1931, and said notice of November 20, 1931, the proxies of stockholders were procured reading to Oscar R. Thorson, Emory H. English and J. H. Thompson, Emory H. English, and Oscar R. Thorson being the representatives of John A. Thompson, and these proxies were voted by Oscar R. Thorson in unison with the stock and proxies held by John A. Thompson, controlled and dominated the stockholders' meeting held on December 22, 1931, as a part of the scheme, plan and conspiracy. At this meeting Oscar R. Thorson voted by proxy 1011 shares and in person 18 shares and John A. Thompson by proxy 505 shares and in person 137 shares and Mrs. John A. Thompson in person 20 shares, M. White 18 shares. The shares thus voted by Thorson, John A. Thompson, M. K. Thompson and M. White being 1709 shares, which were more than a majority of the 2608 shares represented at the meeting. That

at said meting there was adopted a resolution authorizing the issuance of first mortgage bonds in the aggregate principal sum of $200,000., and the conveyance by mortgage deed of trust of all of the property of the Bridge Company to secure the payment of such bonds. The resolution relating to the bond issue was voted and carried by the votes of said John A. Thompson and his controlled associates Oscar R. Thorson, M. White and his wife M. K. Thompson. Such resolution was presented at said stockholders' meeting with false preambles and representations as reasons or excuse for the voting of the bond issue as follows:

[fol. 72] (a) "Whereas it was originally contemplated that the funds necessary to construct the Blackhawk Bridge would be acquired through the sale of stock and whereas a substantial part of the funds were acquired in that manner, but due to a change in general economic conditions it developed that it was impossible to realize sufficient funds from that source as rapidly as the same were required to complete the bridge project economically.

(b) "Whereas, it was necessary for the company to borrow funds to expedite the completion of said bridge and avoid disaster and whereas the amount of steel required and cost of building the bridge was greatly in excess of the cash originally estimated.

(c) "Whereas, there now remains unsold capital stock of the company in the approximate amount of $120,000.

(d) "Whereas, it now becomes necessary for the company to raise sufficient funds with which to pay loans made to the company by the Phoenix Finance System, Inc., a greater portion of which is secured by mortgage on the property of the company and which is now past due.

(e) "Whereas, the company for these and other corporate purposes will be presently required to borrow not to exceed $100,000. to discharge these obligations and others which it is contemplated will presently arise.

(f) "Whereas, it is anticipated that additional funds, not to exceed $100,000. may from time to time be required to discharge present or future obligations of the company

to provide for the payment of pavement and improvement of dike and to care for flood conditions and other emergencies.

(g) "Whereas, the company finds itself unable to acquire funds for these purposes except through the creation and issuance of bonds secured by mortgage deed of trust covering the assets, property and income of the property, and whereas the interests of the stockholders would be [fol. 73] jeopardized unless such funds or a part thereof are made available within a reasonable time."

That the aforesaid preamble, statements and representations were misleading, false and fraudulent and made with intent to deceive and defraud the Bridge Company and its stockholders. That said meeting was wholly controlled and dominated by John A. Thompson and his associates, officers and directors of the Phoenix Finance System, Inc. That intervener Fayette D. Kendrick, and other stockholders, relying on the aforesaid false and fraudulent statements contained in said letters and notice and believing the same to be true and knowing not to the contrary sent a proxy in the form aforesaid. That independent stockholders at said meeting relying on the aforesaid representations and believing the same to be true and not knowing the contrary voted for such resolutions, and independent and uncontrolled stockholders who voted for such resolutions did so on account of being deceived by the aforesaid false representations.

38. That following such special meeting, a directors' meeting was held, dominated and controlled by John A. Thompson, at which meeting a purported resolution was passed with respect to the $50,000. mortgage, and with reference to the issuance of the bonds therefor; that at said meeting it was represented and claimed by John A. Thompson that it was a valid and bona fide mortgage, and that said John A. Thompson did not disclose the fact that the alleged mortgage was not based on a proper consideration, and that the same was fraudulent; and that such independent directors as were present, voting for such resolution on the said representations of said John A. Thompson, believed the same to be true, knowing nothing to the contrary and were deceived thereby.

39. On January 5, 1932, a directors' meeting of the Bridge Company was held at which there were present four Thompson controlled directors, Emory H. English, Oscar R. Thorson, A. B. Wilder and M. White and no others, at which meeting these four Thompson-Phoenix [fol. 74] Finance System, Inc., directors passed a resolution to purchase from the Phoenix Finance System, Inc., 517 shares of Class A preferred stock for $51,700., with interest at the rate of 6% from January 1, 1931, and to deliver Class B bonds of the Bridge Company in such face amount as would on the basis of 8% yield $51,700. with interest thereon which amounted to $60,500. of bonds. That neither on the 5th day of January, 1932, nor at any time thereafter did the Iowa-Wisconsin Bridge Company have any surplus with which to make a repurchase of its own stock.

That while the Articles of Incorporation of the Bridge Company contain the provisions set forth in paragraph seven of the interveners' petition of intervention, and paragraph eleven of these findings of fact, the Bridge Company, through the influence of the said Thompson and his associates caused $60,500. of said bonds to be issued to the said Thompson or his owned and controlled institutions. When that was done, there was outstanding other Class A stock held by other stockholders who were not given the permission or opportunity by the Bridge Company, as was the said Thompson and his affiliated companies, to surrender such Class A stock and receive bonds, as did the said Thompson and his institutions. That no notice of intention of the corporation to redeem said Class A shares was mailed or given to holders of such stock, as required by said paragraph seven of the Articles of Incorporation, except to the said Thompson and his controlled companies. That in other words, all of the said Class A stock was not purchased by the Bridge Company at said time through the issuance of the said bonds or otherwise; nor was a portion of the said Class A stock redeemed proportionately, as provided by the Articles of Incorporation set forth in paragraph seven of the petition of intervention and paragraph 11 of these findings. And at said time the said Class A stock was thus surrendered by the said Thompson without notice to other stockholders similarly situated, and that

[fol. 75] such transaction took place without a legal authorizing vote, on the part of the stockholders or directors of the Bridge Company. That so far as Thompson and his associates were concerned, they were voting under the influence of Thompson, but so far as independent stockholders and directors were concerned, they did not know the true facts when they voted for the pretended authorizing resolution.

That during all the times material there was in effect in the State of Delaware a statute, as set forth in paragraph eight of the petition of intervention and paragraph 12 of these findings. That when the said Thompson and his companies exchanged the said Class A stock for the said bonds in the amount of approximately $60,500., such action caused an impairment of the capital of the corporation in violation of said Delaware statute.

That the action of the said Thompson, in promoting said exchange of Class A stock for bonds, was fraudulent and for the purpose of conferring on himself a preference over other holders of Class A stock. That by thus conspiring and acting fraudulently the said Thompson did acquire a preference over other holders of such Class A stock.

40. That on March 7, 1932, a meeting of the board of directors of the Bridge Company was held at which were present Emory H. English, John A. Thompson, M. K. Thompson, Oscar R. Thorson, H. T. Wagner and A. B. Wilder, all Thompson and Phoenix Finance System, Inc., controlled directors, at which a purported resolution was adopted for the delivery of $97,000. of Class A bonds of the Bridge Company to the Phoenix Finance System, Inc., for the purported $50,000. mortgage and interest thereon and for $10,000. to the Industrial Contracting Company, $9,000 to Kramer & Hogg and $11,262.71 to McClintic-Marshall Company, with interest on such items amounting to $83,811.29 and with discount on the bonds of $12,727.31, making a purported total of $96,538.58 and a purported balance of $461.42 being charged to Phoenix Finance Sys-[fol. 76] tem, Inc., on the books of the Bridge Company, making a total of $97,000.

The aforesaid $10,000. to the Industrial Contracting Company was neither due from nor paid by the Bridge

Company as aforesaid and the Bridge Company did not owe the $11,262.71 to McClintic-Marshall Company. That said two items were items that had been fully covered and disposed of by the Bridge Company in its settlement with John W. Shaffer & Company and were items which Thompson & Company, subsidiary of Phoenix Finance System, Inc., had undertaken to pay. That as a part of the scheme, plan and conspiracy leading up to the issuance of said bonds here involved, the said Thompson paid the balance of $11,262.71 to McClintic-Marshall Company and as a form and pretense the said John A. Thompson, dominating and controlling the Bridge Company in its acts, in making payment thereof for the Phoenix Finance System, Inc., as aforesaid, attempted to carry out such transaction as though he was making payment thereof for the Bridge Company and caused false entries to be made on the books of the Bridge Company as though said approximate amount had been advanced by the Phoenix Finance System, Inc., to the Bridge Company and the item paid by the Bridge Company, when in fact the Bridge Company did not owe said item.

The Court further finds:

41. That the Phoenix Finance Corporation, at the time it was organized, was officered and controlled by the same officers as Phoenix Finance System, Inc., and took over the succession both of assets and liabilities, with full notice of the facts and circumstances surrounding the bond issue in controversy in this case, and assumed the entire fruits and activities of its predecessor, so far as concerns this case, and proceeded to carry on with the same notice and purpose, adopting all of the plans and results of its predecessor.

GEO. C. SCOTT,
United States District Judge.

Filed in the District Court December 1, 1936.

[fol. 77] Exhibit "C".

Final Decree.

United States District Court, Northern District of Iowa, Eastern Division.

First Trust & Savings Bank, formerly named Bechtel Trust Company, and A. H. Schubert, Trustees, Plaintiffs,

No. 220. vs. In Equity.

Iowa-Wisconsin Bridge Company, Defendant,

Fayette D. Kendrick, et al., Interveners.

The above entitled cause came before the Court on the first day of December, 1936, it being the first day of the December, 1936 Term of this Court, for the filing of Opinion, ruling upon exceptions to the Master's Report, taking final submission of the cause upon the Master's Report and his advisory findings and the evidence in the cause, and the entry of a Final Decree.

On the 5th day of December, 1934, the cause being at issue and upon the trial docket, was referred to the Hon. James W. Kindig, as Master in Chancery to take the evidence in the cause and report findings of fact and conclusions of law. On the 10th day of March, 1936, the Master having taken all of the evidence in the cause, filed his report embodying his findings and conclusions, and thereafter exceptions were filed to said report by the First Trust & Savings Bank formerly named Bechtel Trust Company, and A. H. Schubert, Trustees, and Phoenix Finance Corporation, plaintiffs, and by defendant and interveners. And on the 13th day of June, 1936, all respective parties appearing by their counsel and by agreement of all parties all exceptions to the Master's Report were argued and submitted at the United States Court Room at Fort Dodge, in [fol. 78] the Central Division of this District. And thereafter the Court received briefs from all counsel, examined and considered the Master's Report and also all evidence taken before the Master. And the Court now being fully advised in the premises, makes and enters the following rulings:

The exceptions of the plaintiffs, trustees, numbered one to eight inclusive, and of Phoenix Finance Corporation, numbered one to six inclusive, are overruled and exceptions are reserved to the respective plaintiffs. Defendant and interveners' exceptions numbered one, two, five and ten having been withdrawn, are not further noticed. Defendant and interveners' exceptions numbered three, four, six and seven are overruled, and exceptions reserved to the defendants and interveners. And defendant and interveners' exceptions numbered eight, nine and eleven are sustained, with exceptions reserved to all opposing parties.

The Court having ruled upon all exceptions, and allowed exceptions to all rulings, now takes final submission of the cause upon the Master's advisory report, findings and conclusions, and upon all evidence taken before the Master and upon depositions filed in the cause and introduced before and considered by the Master.

And the Court now being fully advised in the premises, it is Ordered, Adjudged and Decreed that the findings and conclusions of the Master, except as modified and amplified by additional findings, be adjudged as the findings and conclusions of the Court, with such additional findings and conclusions as are filed in the cause. That the mortgage and bonds in suit were fraudulently issued. That all bonds are without valid consideration, with the exception of the bonds aggregating $15,000., hereinafter specified. [fol. 79] That the bill of the plaintiffs be dismissed as to the plaintiff, Phoenix Finance Corporation, and that the prayer of the bill be denied, except in so far as the Decree provides for the protection of the holders of said $15,000. in bonds. That foreclosure and sale of the mortgaged property be denied, but that in lieu thereof all earnings and revenues of the Iowa-Wisconsin Bridge Company over and above such as may be absolutely necessary to pay maintenance, operating expenses and taxes, be sequestered and impounded for the purpose of paying the following bonds with interest, to-wit, $4,000. in bonds, due Bradshaw, Schenk and Fowler, $6,000. in bonds, due Helmer N. Anderson, and $1,000. in bonds, due each of the following, Laura B. Baker, J. W. Dempsey, Lyle Sign Company, M. B. Stone, and Cobb, Hoke, Benson, Krause and Faegre, or

their respective assigns. That the property be retained under receivership until these obligations, with interest, are fully paid either out of the revenues sequestered as aforesaid, or by other funds found and furnished by the Bridge Company.

Jurisdiction is hereby reserved to deal with all matters arising under the receivership and in connection with adjustment and payment of taxes and counsel fees.

It is further Ordered, Adjudged and Decreed that the entire costs in the case be taxed to the plaintiffs, First Trust & Savings Bank, formerly named Bechtel Trust Company, and A. H. Schubert, Trustees, and Phoenix Finance Corporation. To all of which the plaintiffs have duly excepted.

GEO. C. SCOTT,
United States District Judge.

Filed in the District Court December 1, 1936.

[fol. 80] Exhibit "D".

Memorandum Opinion on Petitions for Rehearing and for Modification of Decree.

United States District Court, Northern District of Iowa, Eastern Division.

First Trust & Savings Bank, formerly named Bechtel Trust Company, and A. H. Schubert, Trustees, Plaintiffs,

No. 220. vs. In Equity.

Iowa-Wisconsin Bridge Company, Defendant,

Fayette D. Kendrick, et al., Interveners.

After several years struggle by the parties, the above cause came on for final decree on the first of December, 1936, and on that date the Court filed its opinion, its findings of fact and conclusions of law, and entered its final decree. On December 19th, 1936, Phoenix Finance Corporation filed a motion to vacate the decree and dismiss the cause upon the ground that the Court had lost jurisdiction of the cause when it permitted the Phoenix Finance Corporation to be made a party co-plaintiff with the trustees un-

der the mortgage. The theory was that jurisdiction had rested on diversity of citizenship, and the making of Phoenix Finance Corporation a Delaware corporation, co-plaintiff, destroyed diversity of citizenship inasmuch as the Iowa-Wisconsin Bridge Company was also a Delaware corporation. For reasons stated in the supplemental opinion filed January 5th, 1937, the motion to vacate the decree and dismiss the cause was overruled. On January 29th, 1937, Phoenix Finance Corporation filed its petition for rehearing and modification of decree, and on the same date the trustees filed their motion to vacate and dismiss, similar to that previously filed by Phoenix Finance Corporation, and also in the alternative adopted the petition for rehearing of Phoenix Finance Corporation. The interveners in behalf of the Bridge Company filed motions to strike and re-
[fol. 81] sistances to the petitions for rehearing. On the 18th day of February, 1937, these motions and petitions were fully argued orally before the Court and briefs submitted, and all matters then before the Court submitted.

The Court has determined to entertain the petitions for rehearing and modification of decree, rather than to strike the same, and dispose of the same on their merits. Respecting the motions to vacate and dismiss for want of jurisdiction, that matter has been fully answered by the supplemental opinion of the Court filed on the submission of a like motion by Phoenix Finance Corporation, on January 5th, 1937. The petition for rehearing filed by Phoenix Finance Corporation and adopted by the plaintiff trustees, rests upon the claim that the Master to whom the cause was referred in its entirety, received the submission under a misapprehension, and that the plaintiffs had also been of impression that they were to take further testimony at some future time when they submitted their bonds to the Master or to the Court. They further contend that the cause in behalf of the trustees and the Phoenix Finance Corporation was mismanaged by their counsel, and that now having taken in new blood at the bar the present counsel should be given a chance to try the case over.

Having in mind the analogy of petitions for rehearing in equity causes and motions for new trial in law causes, the Court in unable to find any substantial merit in any of the claims for a rehearing. The defense interposed to the

plaintiffs' cause of action was that the bond issue and mortgage securing the same were all a part of a deliberate fraudulent scheme to obtain possession and ownership of the bridge after its completion and freeze out all of the stockholders. This scheme as alleged and as proven, dated back to the inception of a certain $50,000 mortgage, and proceeded forward including the plans and their execution for the issuing of the bonds and the mortgaging of the bridge. During all of this time the Phoenix Finance System Incorporated, and its successor Phoenix Finance Cor- [fol. 82] poration, and the Bridge Company had interlocking directorates. The so-called Thompson interests predominated in all of them. As the Master pointed out in his fourth conclusion of law, in the circumstances with the charge of fraud and conspiracy made, the burden was on the plaintiffs who had brought the suit at the instance of the Phoenix corporations, to show clean hands and fair dealing. This the plaintiffs not only failed to do, but throughout combated the interveners who were permitted to defend in behalf of the Bridge Company. The interveners obtained an Order of Court for the production of the books and records of the Phoenix Finance Corporation before the Master, but Phoenix Finance Corporation vigorously and successfully it appears prevented the production of those books and records, and its officer when on the stand before the Master, declared his inability to produce, for they had been sent to the State of Florida. It is now with poor grace that the plaintiffs invoke the discretion of the Court for a rehearing in order to use those very books and records. Anticipating an adverse ruling, the petitioners alternatively pray for a modification of the decree with provisions commanding the re-issing of certain shares of stock to Phoenix Finance Corporation, which it canceled when fraudulently obtaining the bonds. One might conceive some invidious analogies to this situation. Having attempted the strong box of another, and being hoist by what is now claimed to be a premature explosion, they volubly invoke the compassion of the Court to restore valuable implements of their craft left behind. I see no reason why a court of equity should be deeply concerned in giving any affirmative relief to the Phoenix Finance Corporation. On the other hand, I think the petitions for re-

hearing should be denied and the motion to dismiss and vacate the decree overruled, and it will be so Ordered.

Dated, March 4th, 1937.

GEO. C. SCOTT,
United States District Judge.

Filed in the District Court March 4, 1937.

[fol. 83] Exhibit "E".

(Opinion.)

"United States Circuit Court of Appeals
Eighth Circuit.

May Term, A. D. 1938.

First Trust and Savings Bank and A. H. Schubert, as Trustees, and Phoenix Finance Corporation, Appellants,

No. 11,055. vs.

Iowa-Wisconsin Bridge Company, a Corporation, Defendant, and Fayette D. Kendrick, Warren G. Hayes, Anna W. Schuster, T. H. Bakewell and Ernest W. Haverland, Interveners, Appellees.

Appeal from the District Court of the United States for the Northern District of Iowa.

(August 8, 1939.)

Mr. Vincent L. Boisaubin and Mr. Lon O. Hocker (Mr. Frank Y. Gladney and Messrs. Jones, Hocker, Gladney & Grand were with them on the brief) for Appellants.

Mr. William C. Green and Mr. F. A. Ontjes (Mr. Charles N. Dohs was with them on the brief) for Appellees.

Before Gardner, Woodrough and Thomas, Circuit Judges.

Thomas, Circuit Judge, delivered the opinion of the court.

This is an appeal in equity from a decree denying foreclosure of a Mortgage Trust deed. 19 F. Supp. 127.

2. First Trust and Savings Bank, et al., etc. vs. Iowa-Wisconsin Bridge Co., et al.

The trust deed, dated January 1, 1932, but actually executed February 20, 1932, was given to secure a bond issue of $200,000. It conveyed to the complainant trustees all the property of the defendant including a bridge across the Mississippi river at Lansing, Iowa. The trustees named therein were the Bechtel Trust Company, now called First Trust and Savings Bank, an Iowa corporation, and A. H. Schubert, a citizen of Wisconsin. The grantor, Iowa-Wisconsin Bridge Company, is a Delaware corporation.

On August 28, 1933, the bill of foreclosure was filed in [fol. 84] the district court by the trustees, complainants, against the bridge company, defendant. The bill alleged jurisdiction based upon diversity of citizenship, the authority of the trustees to sue under the terms of the trust deed, default, and acceleration of the due date. The prayer was for foreclosure and sale and the appointment of a receiver. The defendant bridge company filed answer September 25, 1933, admitting the jurisdiction of the court, the execution of the trust deed and the issuance of the bonds; denying complainant's right to the appointment of a receiver; alleging that a part or all of the bonds secured by the trust deed were invalid; and praying the protection of the court. On September 26, 1933, the court appointed a receiver of all of the property of the bridge company with direction to take immediate possession and to operate its business.

On December 5, 1933, by leave of court, Fayette D. Kendrick, a stockholder of the bridge company and citizen of Minnesota, intervened on behalf of defendant, praying that the complainants' bill be dismissed, the bonds cancelled and the deed of trust set aside. He alleged that the bridge company was and had been since 1930 dominated by one J. A. Thompson and his associates; that by the exercise of such domination these men had fraudulently procured the execution and delivery of the trust deed and the issuance of the bonds to themselves or to corporations controlled by them. Kendrick then moved that certain corporations alleged to be controlled by Thompson including Phoenix Finance System, Inc., and Phoenix Finance Corporation,

Delaware corporations, be made parties. This motion was granted. Thereafter Phoenix Finance Corporation appeared and filed answer to the petition of intervention. Inasmuch as the district court found that Phoenix Finance Corporation was in all respects so far as concerns this case the successor of Phoenix Finance System, Inc., and was managed by the same officers, both corporations are hereinafter indiscriminately referred to as Phoenix. The answer of Phoenix denied the charges of fraud and alleged that the corporation was the owner of a large amount of the bonds. Other stockholders of the bridge company, [fol. 85] residents of Iowa, intervened and adopted the pleadings filed by Kendrick. By order of court, the petition of intervention was considered as an answer to the bill of foreclosure.

On December 5, 1934, counsel for the parties agreeing, the court appointed a special master to hear all the issues and to report his findings of fact and conclusions of law. The master, after taking evidence, filed a comprehensive report on March 18, 1936, to which all parties excepted. After a hearing on the exceptions the court adopted the findings of the master, with slight modifications hereafter noted, and amplified them with additional findings. On December 1, 1936, the court entered its decree "That the mortgage and bonds in suit were fraudulently issued. That all bonds are without valid consideration; with the exception of the bonds aggregating $15,000," which were specified. Foreclosure was denied, but the receivership was continued for the purpose of impounding the income of the bridge company until the $15,000 of obligations found to be meritorious should be paid. On December 19, 1936, Phoenix moved the court to vacate all orders entered in the cause and to dismiss the cause without prejudice on the ground that "no diversity of citizenship exists upon which the jurisdiction in this suit is based." A similar motion was filed by the trustees. Both motions were overruled. Thereafter complainants filed a petition for rehearing, or in the alternative to modify the decree. The petition was overruled.

On this appeal two classes of error are assigned: (1) That the district court was without jurisdiction because

diversity of citizenship did not exist; and (2) errors occurring in the proceedings in the lower court. The attack on the jurisdiction will be first considered.

With respect to the jurisdiction of the district court, it must be conceded that prior to the joining of Phoenix as a party there was complete diversity of citizenship. It is appellants' contention that Phoenix is a proper, necessary, and indispensable party, and that after it was joined as a plaintiff diversity of citizenship no longer existed because both Phoenix and the defendant bridge company are citizens of Delaware. Appellees say that Phoenix is only a [fol. 86] formal and not an indispensable party, and that therefore its citizenship is not material to the question of jurisdiction.

It is settled that jurisdiction of the federal court can not be defeated by the joinder of an unnecessary party, Cella vs. Brown, 8 Cir. 144 F. 742, cer. den. 202 U. S. 620; Egyptian Novaculite Co. vs. Stevenson, 8 Cit., 8 F. (2d), 576, 579; and the bringing in of an unnecessary party after the commencement of the suit will not oust the jurisdiction. Sioux City Terminal Railroad & Warehouse Co. vs. Trust Co. of North America, 8 Cit., 82 F. 124, aff. 173 U. S. 99; Weiland vs. Pioneer Irrigation Co., 8 Cit. 238 F. 519, aff. 259 U. S. 498; Phelps vs. Oaks, 117 U. S. 236, 240.

The question here presented, in its simple form, is whether under the facts of this case a bondholder is a necessary and indispensable party in a suit brought by the trustees to foreclose the trust deed where the defense is the invalidity of the trust deed and the bonds because of fraud in their inception.

Looking to the language of the trust deed alone it is apparent that the trustees are the only necessary and indispensable parties plaintiff. The trust deed made it the duty of the bridge company to pay taxes on the mortgaged property, to pay interest on the bonds, and to pay the bonds as they matured. In case of default for a period of sixty days it was provided that the trustees may, and upon the written request of the holders of 25 per cent of the bonds then in default, shall declare the principal of all the bonds due, and "shall proceed to protect and enforce their rights

and the rights of the bondholders under this Indenture by a suit or suits in equity, or at law, * * * by * * * foreclosure hereunder, or for the enforcement by any other appropriate, legal or equitable remedy, as the Trustees * * * shall deem most effectual."

It is further provided in the trust deed that "No holder of any bond or coupon secured hereby shall have any right to institute any suit, action or proceeding in equity or law, for the foreclosure of this Indenture," except in case the trustees after notice and demand refuse to act.

The suit was commenced by the trustees at the request of Phoenix, holder of more than 25 per cent of the bonds, and was prosecuted by attorneys selected by it.

[fol. 87] One of the questions raised in connection with the matter of jurisdiction relates to the applicable law. It is settled that federal courts of equity look to the law of the state for the ascertainment of rights of a substantive character; but in questions of remedy the equity jurisdiction of the national courts under the Constitution and laws is uniform throught the United States and can not be limited in its extent or controlled in its exercise by the laws of the states. Watts v. Camors, 115 U. S. 353; Carolina Power & Light Co. vs. South Carolina Public Service Authority, 4 Cir., 94 F. (2d) 520, 525; Mathis vs. Hemingway, 8 Cit., 24 F. (2d), 951. Cf. A. & R. Realty Co. vs. Northwestern Mut. Life Ins. Co., 8 Cir. 95 F. (2d) 703, 707; Henrietta Mills vs. Rutherford County, 281 U. S. 121, 127. The Conformity Act of 1872 (28 U. S. C. A. 724) by its terms is not applicable to equity causes.

In so far as the right here involved is substantive it is controlled by the laws of Iowa and Wisconsin, in which states the property is situated. Section 10968 of the Code of Iowa of 1935 provides: "A trustee of an express trust, a party with whom or in whose name a contract is made for the benefit of another, or party expressly authorized by statute, may sue in his own name, without joining with him the party for whose benefit the action is prosecuted." In the case of Tucker vs. Silver, 9 Iowa 261, 262, the Supreme Court of Iowa said: "The general rule, independent of the Code, is, that a trustee is a necessary party;" and it

was held that the provisions of the code do not change the rule. See also Bennett Savings Bank vs. Smith, 171 Iowa 405, 408; In re Receivership of Selway Steel Post & Fence Co., 198 Iowa 950, 957-8; Fransham vs. Tow Bros., 196 Iowa 1082, 196 N. W. 71. The Wisconsin rule is the same. Hayes vs. Lewis, 21 Wis. 663; Milwaukee Trust Co. vs. Van Valkenburgh (Wis.), 112 N. W. 1083.

If the right in question be regarded as remedial only the federal rule effects the same result and is equally clear. Equity rule 37 provides that, "Every action shall be prosecuted in the name of the real party in interest, but an executor * * * trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another * * * may sue in his own name without joining with him the party for whose benefit the action is brought."

[fol. 88] Under this rule it has been held that unless the trustee of an express trust refuses to act or is otherwise disqualified such trustee is an indispensable party and the joinder of a beneficiary will not defeat jurisdiction. Coal Co. vs. Blatchford, 11 Wall. 172, 175; Knapp vs. Railroad Co., 20 Wall. 117, 123; Dodge vs. Tulleys, 144 U. S. 451, 456; Bullard vs. Cisco, 290 U. S. 179, 190; Hamer vs. New York Railways Co., 244 U. S. 266; Richter vs. Herome, 123 U. S. 233; Kerrison vs. Stewart, 93 U. S. 155; Mexican Central Railway Co. vs. Eckerman, 187 U. S. 429; Allen-West Commission Co. vs. Brashear, 176 F. 119, 121; Smith vs. Bell, 8 Cir., 217 F. 243, 244.

The Supreme Court said in Dodge vs. Tulleys, supra, where there was but one beneficiary: "Whether one (beneficiary) or many, the trustee represents them all, and in his name the litigation is generally and properly carried on. The fact that the beneficiary in a trust deed may be a citizen of the same state as the grantor, would not, if the trustee is a citizen of a different state, defeat the jurisdiction of the federal court."

Furthermore, it is plain that the district court acquired complete jurisdiction over the mortgaged property when the suit was commenced and the receiver took possession. Palmer vs. Texas, 212 U. S. 118; Marcell vs. Engebretson, 8 Cir., 74 F. (2d) 93. At that time, before Phoenix became

a party, there was complete diversity of citizenship. Had Phoenix not become a party the court could have proceeded to final judgment, granting or denying foreclosure. It could have decided every issue, including the validity of the trust deed and the amount of the debt secured thereby; and the decree would have been binding upon the bondholders without their presence as parties to the record. Shaw vs. Little Rock and Ft. Smith Ry Co., 100 U. S. 605; Elwell vs. Fosdick, 134 U. S. 500; Kerrison vs. Stewart, 93 U. S. 155; Ritcher vs. Jerome, 123 U. S. 233.

Appellants contend that the proceeding below was a consolidation of two separate and distinct suits, one brought by the trustees to foreclose the trust deed and one brought by the bridge company and interveners to cancel the bonds held by Phoenix: and that the jurisdiction as to each [fol. 89] controversy must be determined separately. This contention is without merit. The object of the interveners was to have the trust deed and the bond issue as an entirety decreed to be void as a complete defense. The lower court acted upon that theory. It is true, as appellants point out, the appellees made no specific allegations of fraud on the part of the minority bondholders. But the petition of intervention did allege that the execution of the trust deed and the issuance of bonds were a part of a fraudulent scheme on the part of Thompson and his associates, and that none of the bonds had passed to bona fide purchasers. It was the duty of the court before decreeing foreclosure to pass upon the validity of the deed of trust. Speers Sand & Clay Works vs. American Trust Co., 4 Cir., 20 F. (2d) 333, 336. Further, if the controversy between the two Delaware corporations should in any way be considered as a separate controversy involving only the validity of certain of the bonds, then it was ancillary to the foreclosure proceeding, and jurisdiction attached irrespective of citizenship, because the subject matter had been drawn into the federal court under the receivership before Phoenix became a party. Morgan's Co. vs. Texas Central Ry., 137 U. S. 171, 201; Krippendorf vs. Hyde, 110 U. S. 276. The court did not err in overruling appellants' attack on the jurisdiction.

The combined specifications of error of the various appellants assailing the proceedings in the district court present the following contentions;

1. In the transactions leading to the execution and delivery of the trust deed and the issuance of the bonds there was no fraud, no domination or control or overreaching of the bridge company by Thompson and his associates. Even if there were fraud the trust deed and bonds were valid.

2. The bridge company received full consideration for the bonds.

3. The decree is erroneous because it denied foreclosure and sale for the benefit of those holders of bonds who were meritorious creditors of the bridge company to the extent of $15,000.

4. The decree is broader than the issues.

5. Phoenix Finance Corporation is entitled for foreclosure for the bonds held by it.

[fol. 90] 6. The court erroneously denied the petition for rehearing.

7. The court erred in refusing to modify the decree and to compel the defendant bridge company to restore to Phoenix 517 shares of bridge company stock given in exchange for bonds.

The first two of these contentions involve findings of fact rather than questions of law. The appellants insist that the evidence does not sustain the findings of the master and of the district court upon these issues. Their findings are presumptively correct, and a very heavy burden rests upon the party who attacks them on appeal. Davis vs. Schwarts, 155 U. S. 631, 636; Schock vs. Malloy, 8 Cir., 26 F. (2d) 621, 623; Tyronza Special School Dist. vs. Speer, 8 Cir., 94 F. (2d) 825.

To bring into view the grounds on which it is claimed the court erred in the particulars alleged calls for a brief survey of the history of the bridge company, of the facts in evidence and of the findings and conclusions of the court.

The court found that the evidence discloses that about March 20, 1928, the Lansing Bridge Company was organized under the laws of Delaware to construct and operate a bridge across the Mississippi river from Lansing, Iowa, eastward to the Wisconsin shore. In June the name of the

company was changed to Iowa-Wisconsin Bridge Company. The corporation was authorized to issue no par common stock and preferred stock with a par value of $100 a share, the respective amounts of which were changed from time to time by amendment of the articles of incorporation. The articles provided that if less than all the shares of the preferred stock were redeemed the selection of shares to be redeemed must be made by lot or pro rata, and that 30 days written notice of intention to redeem must be mailed to holders of stock to be redeemed. And the statutes of Delaware provided that no corporation should use its funds or property to purchase its own stock, when such use would impair the capital of the corporation.

The bridge was originally promoted in 1929 by residents of Lansing, Iowa. They employed Vernon W. O'Connor and John W. Shaffer of Minneapolis, Minnesota, as promoters of the bridge company. As such promoters O'Connor and Shaffer acted through the medium of the [fol. 91] Standard Shares Holding Company and John W. Shaffer & Company. Shaffer owned all of the stock of both these corporations, except qualifying shares of other directors. On October 26, 1929, a contract was made between the bridge company and Standard by the terms of which Standard was designated as trustee of the bridge company. This contract authorized the trustee to construct and operate the bridge "either directly or by other persons or corporations with whom it shall contract * * *" at a cost not to exceed $600,000. The bridge was to be completed by October 1, 1930. On November 12, 1929, the power and authority of Standard was further increased by a resolution of the board of directors of the bridge company by the terms of which Standard was appointed "reorganization manager, agents and trustees for the Company." Standard was authorized to enter into contracts for completing the bridge, was given 4000 shares of the bridge company stock for its services, and was vested with the "management of the fiscal affairs of the Company." Shaffer thus acquired complete control of the bridge company through the medium of his Standard Shares Holding Company and its ownership of bridge company stock. Contracts were promptly made for building the bridge.

On November 9, 1929, the bridge company entered into a contract with Shaffer employing him as engineer to make plans for and to supervise the construction of the bridge. For his compensation he was to receive "10 per cent of the total cost of the construction of said bridge, causeways and approaches." On April 4, 1930, this contract was assigned by Shaffer to John W. Shaffer & Co.

Likewise on December 9, 1929, acting as trustee and agent for the bridge company, Standard, by Shaffer as president, entered into a contract with O'Connor for the erection of the substructure of the bridge at a cost of $193,196.80 with a provision for extras on the basis of cost plus 15 per cent. [fol. 92] This contract was also assigned by O'Connor to John W. Shaffer & Co. on April 4, 1930. He had previously sublet the contract to Industrial Contracting Company on such terms that the final cost to his assignee was $97,976.36.

On April 1, 1930, O'Connor was elected president of the bridge company, and Shaffer, who had been secretary of the bridge company, resigned, and his personal secretary was elected to fill the office. At that time Standard held 4000 out of the 4641 outstanding shares of bridge company stock.

By October, 1930, the grading and substructure were nearly completed. No contract had been let for the erection of the superstructure. The work had been financed through the sale of bridge company stock. The sale of stock had slowed up, and Shaffer and Standard, the trustee, were confronted with the necessity of working out a plan to finance the completion of the bridge through the sale of more stock.

It was at this point that Shaffer entered into negotiations with John A. Thompson of Des Moines, Iowa, a promoter and financier, who had an office with Shaffer and his corporations and business interests in Minneapolis. Thompson carried on his financial and other business operations largely by means of a group of owned, controlled and affiliated corporations. Only three of these corporations are of interest here. They are Thompson & Company, Phoenix Finance System, Inc., and its successor in interest Phoenix Finance Corporation.

The master and the court found that Shaffer and Thompson entered into an "agreement" in reference to handling the affairs of the bridge company in October or November, 1930. It is clear from what followed that an understanding of some sort was arrived at between them designed to complete the financing and construction of the bridge, and, as the appellees claim, to exploit the purchases of stock and fraudulently to take the bridge from the defendant company. On November 1, 1930, Thompson was made president of the bridge company, and, if he had not learned before that date, he was soon made familiar with its history, with its financial condition, and with Shaffer's manipulation of its affairs.

[fol. 93] For the accomplishment of their purpose a series of contracts were entered into all relating to the same end. While these contracts bear different dates, which in some instances appear confusing, their subject matter and the relation of the parties bear evidence that they were all in contemplation by their designers at the same time.

On November 11, 1930, a contract was executed between John W. Shaffer & Company, by Shaffer, its president, and Iowa-Wisconsin Bridge Company, by J. A. Thompson its president, by the terms of which John W. Shaffer & Co. agreed to furnish the material and complete the superstructure of the bridge company, for $10,000. cash and 3200 shares of the capital stock of the bridge company, with a provision for extras. The work was to proceed with sufficient dispatch that the bridge would be open for traffic by March 10, 1931. The contractor agreed to furnish a surety bond at the expense of the owner. Subsequently Thompson waived the giving of the surety bond.

Evidently in anticipation of the making of the foregoing contract, John W. Shaffer & Co. entered into a contract on November 8, 1930, with McClintic-Marshall Company for the purchase of the steel for use in the construction; and on November 11, 1930, Shaffer & Co. sublet the contract for the erection of the steel superstructure to Industrial Contracting Co. on a unit price basis with a guaranteed maximum cost of $141,734. Both contracts provided for punctual payments on work done at short intervals.

Another of this series of contracts is dated November 10, 1930, the parties to which were Phoenix, by J. S. Thompson, president; John W. Shaffer & Co., by Shaffer, president; and the bridge company, by O'Connor, chairman of the board. This contract provided (1) that in consideration of 140 shares of bridge company stock Phoenix guaranteed the cash payments to be made by John W. Shaffer & Co. to McClintic-Marshall Co. and to Industrial Contracting Co. under their subcontracts for steel and the erection of the superstructure; (2) Shaffer & Co. agreed to make the guaranteed payments promptly; (3) the bridge company agreed that in the event Phoenix was required to make any payments under its guaranty for Shaffer & Co. the bridge company would on demand pay Phoenix an equal sum with interest at 8% after March 1, 1931; (4) Shaffer & Co. further agreed to furnish a standard completion bond guaranteeing completion of the bridge. The contract further [fol. 94] provided (5) that in case of default in any payment to Phoenix it should have the right to take possession and control of the bridge. The 140 shares of stock were actually issued to Phoenix on November 1 and disposed of by the latter prior to November 9.

About the time the foregoing contracts were made, the exact date not appearing in the record, John W. Shaffer & Co. sold to Thompson & Co. the 3200 shares of the bridge company stock issued under the superstructure contract of November 11, 1930, at a price of 70 and took in payment Thompson & Company's note for $224,000. The deal was made with J. A. Thompson acting for Thompson & Compay. The note was fully paid in installments.

On November 26, 1930, a "Stated Settlement Agreement" was executed between Standard and the bridge company. This settlement terminated the trust agreement of October 26, 1929. Standard accounted for 3509½ shares of stock sold by it at $100 per share, returned assets which were ultimately liquidated for about $80,000, and turned back the bridge company stock held by it, except 1500 shares which were later surrendered in consideration of a contract to manage the bridge after completion.

During the following winter, for the purpose of expediting the sale of stock, Thompson sought the aid of the El-

liott-Rodgerson Company of Minneapolis. Thompson assured the officers of that company that $750,000 would be the entire capitalization of the bridge, that no mortgage would be placed upon it and no bonds would be issued. Relying upon these representations, which were passed on to the public, Elliott-Rodgerson Company sold to the public about $100,000 worth of bridge company stock at $100 per share.

On March 10, 1931, a directors meeting, attended by four directors, was informed by Thompson that the funds from the sale of stock were not adequate to finance the rapid completion of the bridge. The directors thereupon authorized and the officers executed a mortgage upon all of the company's assets to Phoenix to secure a loan of $50,000. Checks for $35,000 and $15,000 were drawn by Phoenix, endorsed by the bridge company, and returned to Phoenix.

The bridge was completed and opened on June 17, 1931.

On October 23, 1931, at a meeting of the board of direc- [fol. 95] tors of the bridge company Oscar Thorson, who was then secretary of the company and one of the directors elected at Thompson's request, stated that another $40,000 was needed to pay off pressing creditors, who were not named. Consideration of this matter was postponed until the meeting of November 10, 1931, when the directors authorized the $200,000 bond issue which is the subject of this suit. On December 22, 1931, a meeting of stockholders approved the bond issue.

The consideration claimed by appellants to have been paid by the parties to whom the bonds were issued may be summarized as follows:

To Phoenix in consideration of		
1. In exchange for its mortgage dated March 10, 1931.		
Principal of mortgage	$50,000.00	
Accrued interest	3,548.56	
Allowance to give 8% yield on bonds	12,727.31	
		$66,275.87
2. For advancements under guaranty contract of November 10, 1930.		
To Industrial Contracting Co.	10,000.00	
To McClintic-Marshall Co.	11,262.71	
		21,262.71

3. Paid Kramer & Hogg to discharge mechanic's lien	9,000 00	
4. Cash	461.42	
5. In exchange for 517 shares of bridge company stock with accrued interest	60,500 00	
6. As security for		
Payment of taxes	$ 3,125 00	
Advancements	14,610.19	
	$ 17,735.19	
		20,100 00
To attorneys as security for fee of	4,000 00	10,000 00
To Anderson for claim of	6,000 00	7,400 00
To five claimants for	5,000.00	5,000 00
	$ 15,000.00	
		$200,000 00

[fol. 96] It will be observed that of the total issue $22,400 of bonds were issued as security or in payment of claims against the bridge company by claimants other than Phoenix for obligations aggregating $15,000, and the remainder of the bonds in the sum of $177,600 were issued to Phoenix. The court and the master both found that the $15,000 of claims were meritorious, and the decree provided for their payment by the receiver.

The important issue in the case is the question of the sufficiency of the consideration for the $177,600 of bonds issued to Phoenix. The court found that Thompson deliberately planned to defraud the bridge company. We shall pass by several findings of the court supporting in some measure this conclusion and direct our inquiry more particularly to the bond issue. It is not disputed that Thompson during the period under review was president of the bridge company and also of Phoenix, and that others of his associates were members of the board of directors or held other offices in both corporations.

The rule for the guidance of the court in passing upon all these transactions was stated by the Supreme Court in Geddes vs. Anaconda Mining Co., 254 U. S. 590, 599, as follows:

"The relation of directors to corporation is of such a fiduciary nature that transactions between boards having common members are regarded as jealously by the law as

are personal dealings between a director and his corporation, and where the fairness of such transactions is challenged the burden is upon those who would maintain them to show their entire fairness and where a sale is involved the full adequacy of the consideration. Especially is this true where a common director is dominating in influence or in character. This court has been consistently emphatic in the application of this rule, which, it has declared, is founded in soundest morality, and we now add in the soundest business policy. Twin-Lick Oil Co. vs. Marbury, 91 U. S. 587, 588; Thomas vs. Brownville, Fy. Kearney & Pacific R. R. Co., 109 U. S. 522; Wardell vs. Railroad Co., 103 U. S. 651, 658; Corsicana National Bank vs. Johnson, 251 U. S. 68, 90."

[fol. 97] Compare McCandless vs. Furlaud, 296 U. S. 140, 158.

We turn to the record. The bonds issued to Phoenix were authorized by two resolutions of the board of directors of the bridge company. The first resolution was adopted March 7, 1932, and authorized the bonds included in the first five items of the foregoing summary aggregating $157,500. The second resolution was adopted July 7, 1933, and authorized the sixth item on the summary. The directors present at both meetings included Thompson and persons selected as directors by him. Other members of the board were absent.

The first item on the summary in exchange for which bonds were authorized was the $50,000 mortgage dated March 10, 1931, including interest and discount on the bonds to make them yield the equivalent of 8%. The master and the court found that this mortgage was procured by fraud and was without consideration. The evidence supports the finding. The alleged consideration was two checks of $35,000 and $15,000 each given by Phoenix to the bridge company under date of March 11, 1931. While entries were made on the books indicating that the bridge company received and paid out $50,000 on March 10, the circumstances justify the court's finding that the company received no benefit from the transaction. The checks both passed by a series of endorsements back into the bank account upon which they were drawn. Thompson offered

an explanation for the method of handling the transaction, which he said was for the purpose of obtaining cash quickly to meet payrolls and pay material-men, but the explanation does not show that Phoenix parted with anything or that any cash was made available to the bridge company.

The court also found that the issue of bonds for the alleged payments of $10,000 to Industrial Contracting Co. and $11,262.71 to McClintic-Marshall Co. was fraudulent. Shaffer & Co. owed these items and they were paid by Phoenix. Thompson through his wife caused entries to be made in the bridge company books showing the money to have been advanced to the bridge company by Phoenix. The liability of the bridge company is predicated upon the guaranty contract of November 10, 1930. But in a settlement agreement of August 6, 1931, Shaffer & Co. settled with the bridge company some disputed claims for extras [fol. 98] and received from the bridge company 200 shares of stock of the value of $20,000 and securities of the value of $2,475. Shaffer turned over to Thompson & Co., $10,000 in value of the stock, and Thompson & Co. agreed to pay the claims of Industrial Contracting Co. and McClintic-Marshall Co., thereby releasing Shaffer & Co., the debtor. Assuming that the contract of guaranty of November 10, 1930, was valid, the court found that the bridge company was released. Whatever legal validity may be attributed to either contract, the fact remains that Thompson appears all the way through representing both the bridge company and the Phoenix interests, and in every instance to the disadvantage of the bridge company and to the advantage of the Phoenix interests. The finding of the court with respect to these two items must be sustained.

The master found that the bridge company received full consideration for the $9,000 paid by Phoenix to Kramer & Hogg for the release of a mechanic's lien, and no consideration for the alleged payment of $461.42. The court disallowed both items, the latter as not established by the evidence and the first on the ground that the plaintiffs were not entitled to any affirmative relief. The court found several items of value chargeable to Phoenix on the ground of fraud which much more than off-set the two items, if valid. Some of these findings abundantly supported by

the evidence will be noted. The guaranty contract of November 10, 1930, recites a delivery to Phoenix of 140 shares of bridge company stock of the value of $14,000 in consideration of a guaranty by Phoenix to pay Shaffer & Co.'s obligations to McClintic-Marshall Co. and Industrial Contracting Co. in the event of Shaffer & Co.'s default and an agreement by the bridge company to repay Phoenix any sums which Phoenix might be required to pay on account of the guaranty. Thompson later waived the requirement of the contract that Shaffer & Co. should protect the bridge company with a surety bond. The court held that the contract was fraudulent and that there was no consideration for the $14,000, and that Phoenix is indebted to the bridge company in that amount. Again, on November 5, 1930, Thompson purchased 65 shares of bridge [fol. 99] company stock at $100 a share; on December 31st he purchased 170 shares, and A. B. Wilder, a director of the company 10 shares. Later Thompson wrongfully credited Thompson & Company, a subsidiary of Phoenix, on the books of the bridge company with a 15% commission on the sale of this stock in the amount of $3,675. On November 1, 1931, Thompson and his companies turned over to the bridge company, when he was in control of its affairs, worthless notes in the amount of $5,410.85, which had been taken in the sale of their own stock, and took from the bridge company an equal sum in cash. Other charges equally flagrant are found by the court. All of these findings, supported as they are by evidence, justified the court in holding that Phoenix is not entitled to credit for the $9,000 and $461.42 items.

The $60,500 of bonds issued in exchange for 517 shares of preferred stock were clearly invalid. Section 19 of the General Corporation Laws of Delaware forbids a corporation to repurchase its own stock when to do so would impair its capital. It was stipulated that the bridge company had no surplus from which to make the purchase. Further, at that time there were outstanding other shares of preferred stock of the bridge company the holders of which were not given notice nor opportunity to surrender it, as required by the articles of incorporation of the bridge company. Thompson's explanation of this transaction is that the 517 shares were never sold outright,

but that Phoenix took the stock to sell to the public, and advanced money on it to the bridge company; and that the bridge company had agreed to pay such advances with interest. The form of the transaction was otherwise. The bridge company under a contract signed on its behalf by Thompson delivered $10,000 and 3200 shares of its stock to Shaffer & Company in payment for the erection of the superstructure of the bridge. Shaffer & Co. sold the stock to Thompson and Company at 70 for a $224,000 note. In selling the stock at 100 Thompson & Company made a profit of 30 per cent. The court was justified in finding that the transaction was what it purported to be instead of accepting Thompson's subsequent explanation. Thompson and Shaffer were both capable business men, advised by competent lawyers; it is reasonable, therefore, to believe that the contract of November 11, 1930, by the terms of which Shaffer & Company agreed to build the superstructure of the bridge correctly expressed the intention [fol. 100] of the parties.

The last $20,100 of bonds were issued to Phoenix as collateral to secure a purported indebtedness of $17,735.19. The master disallowed all but $3,125 which was used to pay taxes. This is a just claim, but is more than off-set by the $14,000 and other items referred to above. $9,806.10 of the amount were furnished by Phoenix to pay interest on bonds held by Phoenix, which were known by the officers of Phoenix to be fraudulent. The transaction amounts to no more than a manipulation to obtain more bonds and increase the secured claims against the bridge company. $1,505.75 was charged for salaries to Phoenix officers and employees. We find no argument of appellants in defense of this item. The remainder of the claim is for cash items alleged to have been advanced by Phoenix to the bridge company, which, if allowable, are wiped out by the indebtedness of Phoenix to the bridge company.

It is argued with great earnestness by appellants that notwithstanding appearances the bridge cost $815,146.85 of which only $653,659.23 were paid for by outstanding stock, and that the difference of $161,487.62 was furnished by Phoenix; that the bridge company had no other source of income. This would be a formidable argument except

for the fact that the bookkeeping by which the result is reached is set out and it does not bear analysis. The figures are confuted by the facts.

We conclude that the record supports the lower court's findings with respect to lack of consideration for the $177,600 of bonds issued to Phoenix.

Appellants' contention that the issuance of these bonds, was not fraudulent because it was accomplished in the exercise of business judgment by the management of the bridge company, without overreaching, and with the full knowledge and approval of the stockholders, is not sustained by the record. When the bond issue was proposed Thompson was president of the bridge company, as well as the dominant figure in Phoenix and the Thompson company. The bridge company's books were kept by employees of Phoenix, and it is not denied that Thompson at all times after November 1, 1930, managed the finances of the bridge company. In the December 31, 1931, balance sheet [fol. 101] of Phoenix Finance System, Inc., which was prepared under Thompson's direction, the bridge company is listed as a subsidiary. At the March 10, 1931, meeting of the directors, when the $50,000 mortgage was given Phoenix for the "revolving checks," the only directors present were Thompson, V. W. O'Connor, who had been Shaffer's partner and who testified that he relied on Thompson and followed his directions, Wilder, who was a Phoenix director, and Thorson, who was made a director after Thompson took control, at Thompson's suggestion. At the meeting of November 10, 1931, when the bond issue was authorized, there were present 9 of the 11 directors, including Thompson, Wilder, English, who was another Phoenix director, M. White, who was Thompson's secretary and an officer in some of his companies, and Thorson. The resolution authorizing the bond issue recited that the corporation was indebted to Phoenix for $50,000 secured by a mortgage, and to McClintic-Marshall for $12,000 to Kramer & Hogg for $13,000, to Phoenix for payments made to Industrial Contracting Co. $10,000, and to other unnamed creditors $40,000. Whether the directors were deceived by Thompson in this connection or whether they knew and acquiesced, they violated their duty to the stock-

holders in authorizing a bond issue to pay these non-existing obligations. When the management solicited proxies from the stockholders for approval of the bond issue at the stockholders meeting of December 22, 1931, similar misrepresentations were made. Consent of the stockholders obtained without disclosure of the circumstances does not excuse or ratify the fraud. Farwell vs. Pyle-National Co., 289 Ill. 157, 124 N. E. 449; Gross Iron Ore Co. vs. Paulle, 132 Minn. 160, 156 N. W. 269; 14a C. J. 100; 13 Am. Jur. Corporation sec. 978.

Appellants also complain of the terms of the decree as it affects bondholders other than Phoenix. The court found that $5,000 worth of bonds had been issued in consideration of claims held in that amount; $7,400 worth of bonds were issued to Helmer Anderson in consideration of a claim for $6,000; and $10,000 worth were issued to a firm of attorneys to secure a $4,000 debt. Although the court found that note of these bondholders were holders in due course it concluded that equity should be done them so far as possible without doing greater injustice to [fol. 102] the estate. The decree therefore denied foreclosure as to any of the bonds, but provided that the income of the bridge be impounded until the $15,000 of claims, found to be meritorious, should be paid. Appellants assert that in this respect the decree goes beyond the scope of the issues and takes property without due process from persons not parties to this suit. As has already been pointed out the trustees represent all of the bondholders for the purpose of determining whether the trust deed is valid. The pleadings put that issue before the court, and it has not been determined that the trust deed itself is not valid because it is tainted with fraud. The court also found that there had been no showing that any of these bondholders were bona fide purchasers. Stewart vs. Lansing, 104 U. S. 505, Iowa Code, Sec. 9519. If these findings are correct the decree is proper. Under the circumstances we think there is no room for the trustees to complain of the treatment given these claimants, since their equitable rights are fully protected.

Appellants further suggest in their brief that it is not shown that Phoenix Finance Corporation participated in the fraud, and that it is accordingly entitled to a decree

of foreclosure for the bonds held by it. This claim lacks merit. Thompson testified that Phoenix Finance Corporation was organized December 29, 1931, for the purpose of taking over all of the assets of Phoenix Finance System, Inc., and of several other corporations. After the consolidation had been effectuated the officers of Phoenix Finance System, Inc., became the officers of Phoneix Finance Corporation. The new corporation with the same officers was in full control when the board of directors of the bridge company adopted the resolution of July 7, 1933, authorizing the second issue of bonds with full notice of the circumstances surrounding their issue, and that it proceeded to adopt and carry on the fraudulent scheme of its predecessor. Since this finding is supported by evidence Pheonix Finance Corporation is in no better position to recover on the bonds than would be Phoenix Finance System, Inc., had the consolidation not been effected.

[fol. 103] After the decree had been entered the appellants filed a petition for rehearing, and Phoenix prayed in the alternative that the decree be modified (1) by reserving from adjudication the question of the validity of the $50,000 mortgage dated March 10, 1931; (2) by permitting Phoenix to institute an action at law against the bridge company, if it so desires, for money had and received; and (3) by reinvesting in Phoenix the 517 shares of bridge company stock surrendered in exchange for bonds. The court overruled the petition both for rehearing and for modification of the decree. The petition for rehearing was properly denied. The granting of a rehearing is within the court's sound discretion, and a refusal to entertain a petition therefor, or the refusal of the petition, if entertained, is not the subject of appeal. Wayne Gas Co. vs. Owens, 300 U. S. 131, 137; United States vs. Benz, 282 U. S. 304; United States vs. Mayer, 235 U. S. 55; Zimmern vs. United States, 298 U. S. 167; Aspen Mining Co. vs. Billings, 150 U. S. 31, 36; Roemer vs. Bernheim, 132 U. S. 103; Liebing vs. Matthews, 8 Cir., 216 F. 1.

The petition for modification of the decree was properly refused. The request to withhold from adjudication the question of the validity of the $50,000 mortgage and to permit Phoenix to sue for money had and received are

plainly without merit. These questions were within the issues properly decided in the decree. In refusing to modify the decree to require the bridge company to return to Phoenix the 517 shares of stock surrendered in exchange for bonds the court invoked the maxim that "He who had done iniquity shall not have equity." This "clean hands doctrine" is subject to the familiar limitation that a plaintiff is not barred from relief in a court of equity unless his wrong has an immediate and necessary relation to the equity for the enforcement of which he prays. Keystone Co. vs. General Excavator Co., 290 U. S. 240; Talbot vs. Independent Order of Owls, 8 Cir., 220 F. 660; Olsness vs. Home Ins. Co., 8 Cir., 14 F. (2d) 907; Trice vs. Comstock, 8 Cir., 121 F. 620; Primeau vs. Granfield, 2 Cir., 193 F. 911. In the present case the district court adopted the view that all of the transactions leading up to the issuance of the bonds were steps in a single fraudulent enterprise [fol. 104] to obtain ownership of the bridge after a foreclosure. We are not disposed to hold that this view of the lower court is wrong; and therefore we cannot say that appellants are entitled to have relief in equity in respect to any part of the fraudulent enterprise. It may be added that the record does not compel the inference that there was no fraud in the original issuance and transfer to Phoenix of the 517 shares of stock.

Having determined that the appellants had no standing to maintain their suit, the district court had neither the right nor the duty to compel the bridge company to restore what it had received from the bondholders. This is not a case in which the defrauded party is suing to rescind. Here the fraud has been pleaded only as a defense. Where the defrauded party is suing to rescind he must "do equity" by restoring whatever he received from the wrongdoer; but when the wrongdoer as plaintiff is attempting to enforce the tainted contract he is turned out of court empty handed. Columbus vs. Mercantile Trust Co., 218 U. S. 645, 662; Manufacturers' Co. vs. McKey, 294 U. S. 442, 450; Mortgage Corp. vs. Levy, 5 Cir., 11 F. (2d) 270; Connecticut Life Ins. Co. vs. Benedict, 2 Cir. 88 F. (2d) 436; Pomeroy, Equity Jurisprudence, sec. 386; Cf. Farrington vs. Stucky, 8 Cir., 165 F. 325. In Columbus vs. Mercantile Trust Co., supra, where the plaintiff was seek-

ing an injunction, the district court held that the plaintiff was not entitled to such an injunction, but found that the defendant had been guilty of certain inequitable conduct, and entered a decree requiring the defendant to do equity as a condition for dismissing the plaintiff's bill. The Supreme Court reversed, saying:

"The court justified the imposition of conditions under the maxim that he who seeks equity must do equity. But this maxim is one which applies to him who affirmatively seeks equitable relief. * * * Manifestly the maxim cannot vest in the chancellor the power which has been exercised. It is true that the city by a cross bill asked to have the contract declared at an end for non-performance. But this was defensive relief."

[fol. 105] Under these long established principles of equity and the pleadings and proof in this cause the court did not err in refusing to modify the decree as requested by appellants by granting to complainants affirmative relief against the defendant.

For the foregoing reasons the decree of the district court is Affirmed.

A true copy.

Attest:

(Signed) E. E. KOCH,
Clerk, U. S. Circuit Court of Appeals, Eighth Circuit.

(Seal)

[fol. 106] Exhibit "F".

Sum Case

New Castle County,—ss.

The State of Delaware,

To the Sheriff of New Castle County—Greeting;

We command you, That you summon Iowa-Wisconsin Bridge Company a corporation duly organized and existing under the laws of the State of Delaware late of your County company so that it be and appear before the Judges of our Superior Court at Wilmington, on Monday, the

Eighteenth day of September next to answer Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware of a plea of trespass on the case, etc.

And have you then there this Writ.

Witness, the Honorable Daniel J. Layton, at Wilmington, the First day of May in the year of our Lord one thousand nine hundred and thirty-nine.

Issued June 22, 1939

MARTIN G. HANNIGAN,
Prothonotary.

(Reverse side)

No. 65 Sept. Term, A. D. 1939.

Phoenix Finance Corporation a corporation duly organized and existing under the laws of the State of Delaware,

vs.

Iowa-Wisconsin Bridge Company a corporation duly organized and existing under the laws of the State of Delaware.

(Copy)

Sum Case

MM&L, Esqs. Pro. q.

[fol. 107] Exhibit "G".

Sum Case

New Castle County—ss.

The State of Delaware,

To the Sheriff of New Castle County—Greeting:

We command you, That you summon Iowa-Wisconsin Bridge Company a corporation duly organized and existing under the laws of the State of Delaware late of your County Company so that it be and appear before the Judges of our Superior Court at Wilmington, on Monday, the Eighteenth day of September next to answer to Phoenix Finance Corporation a corporation duly organized and

existing under the laws of the State of Delaware of a plea that it hold and keep with it the covenant between them made according to the force and effect of certain articles of agreement between them, etc.

And have you then there this Writ.

Witness, the Honorable Daniel J. Layton, at Wilmington, the First day of May in the year of our Lord one thousand nine hundred and thirty-nine.

Issued June 22, 1939

MARTIN G. HANNIGAN,
Prothonotary.

(Reverse side)

No. 64 Sept. Term A. D. 1939.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

(Copy)

Sum Covenant

MM&L, Esqs. Pro. q.

[fol. 108] Exhibit "H".

Sum Case

New Castle County—ss.

The State of Delaware,

To the Sheriff of New Castle County—Greeting:

We command You, That you summon

Iowa-Wisconsin Bridge Company a corporation duly organized and existing under the laws of the State of Delaware

Late of your County company so that it be and appear before the Judges of our Superior Court at Wilmington, on Monday, the Eighteenth day of September next to answer Phoenix Finance Corporation a corporation duly or-

ganized and existing under the laws of the State of Delaware of a plea of trespass on the case, etc.

And have you then there this Writ.

Witness, the Honorable Daniel J. Layton, at Wilmington, the First day of May in the year of our Lord one thousand nine hundred and thirty-nine.

MARTIN G. HANNIGAN,
Prothonotary.

Issued July 11, 1939

(Reverse side)

No. 79 Sept. Term, A. D. 1939.

Phoenix Finance Corporation a corporation duly organized and existing under the laws of the State of Delaware,

vs.

Iowa-Wisconsin Bridge Company a corporation duly organized and existing under the laws of the State of Delaware.

(Copy)

Sum Case.

MM&L, Esqs. Pro. q

[fol. 109] Exhibit "I"

Sum Case

New Castle County—ss.

The State of Delaware,

To the Sheriff of New Castle County—Greeting:

We Command You, That you summon Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware late of your County Company so that it be and appear before the Judges of our Superior Court at Wilmington, on Monday, the Eighteenth day of September next to answer Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware of a plea of trespass on the case, etc.

And have you then there this Writ.

Witness, the Honorable Daniel J. Layton, at Wilmington, the First day of May in the year of our Lord one thousand nine hundred and thirty-nine.

Issued August 17, 1939

MARTIN G. HANNIGAN,
Prothonotary.

(Reverse side)

(Copy) No. 159 Sept. Term A. D. 1939

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

Sum Case

Marvel, Morford & Logan, Esqs.

By. James R. Morford, Esq.

Pro. q

[fol. 110] (Motion for Leave to [Filed] Amendment to Supplemental and Ancillary Bill of Complaint.)

Comes now the defendant, Iowa-Wisconsin Bridge Company, and moves the Court for leave to file amendment to its Supplemental and Ancillary Bill of Complaint, a copy of which amendment is herewith presented.

Dated September 28, 1939.

FRED A. ONTJES,
WM. C. GREEN,
Attorneys for Defendant, Iowa-Wisconsin Bridge Company.

Filed in the District Court September 28, 1939.

[fol. 111] (Amendment to Supplemental and Ancillary Bill of Complaint.)

Comes now the defendant, Iowa-Wisconsin Bridge Company, and with leave of Court amends its Supplemental and Ancillary Bill of Complaint as follows, to-wit:

(1) By adding to sub-paragraph (c) of paragraph 7 thereof, the following:

That the alleged cause of action in said suit is based upon an alleged promissory note of $500.00 dated December 31, 1932, an alleged promissory note for $12,110.19 dated July 7, 1933, an alleged claim for $15,000 for money claimed to have been lent and advanced by defendant to plaintiff in that case, and upon an alleged claim for $7000.00 claimed to have been for money due and payable from the defendant to the plaintiff in that case, Phoenix Finance Corporation, for interest and forebearance. That the said alleged promissory notes of $500.00 and $12,110.19 were involved in the above entitled cause and the adjudication thereof; that in this cause it was claimed that said notes and the alleged considerations therefore formed part of the consideration for the issuance of $20,100 of bonds involved in this action. That this court found that the said bonds were fraudulently issued and wholly without consideration and were more than offset by indebtedness of Phoenix Finance Corporation and its predecessor, Phoenix Finance System, Inc. to this defendant, Iowa-Wisconsin Bridge Company. That as to the alleged claim for $15,000.00 this is a mere restatement of the alleged cause of action on the notes aforesaid stated in different form and in the alternative and the alleged claim for $7000.00 is merely a claim [fol. 112] for interest on the notes aforesaid set in a different form and in the alternative. That all of the alleged claims were involved in and adjudicated in the above-entitled cause in this court.

(2) by adding to sub-paragraph (d) of paragraph 7 the following:

That the alleged cause of action in said suit is based on an alleged agreement claimed to have been entered into between Phoenix Finance System, Inc., John W. Shaffer and Company, and Iowa-Wisconsin Bridge Company dated

November 10, 1930, under and by virtue of which said Phoenix Finance Corporation claims defendant became indebted to Phoenix Finance System, Inc. in the sum of $21,-262.71, claims to be the assignee of said Phoenix Finance System, Inc. and claims the total sum of $50,000.00 for principal and interest; that attached to the declaration in said case is a copy of said purported agreement. That said agreement so referred to in said declaration and sued upon is the same agreement described and referred to by the court in its finding of fact #24, appearing at pages 13, 14 and 15 of Exhibit B attached to the Supplemental and Ancillary Bill of Complaint, which the Court found to be without consideration, a fraud upon the bridge company, void and ultra vires.

(3) By adding to sub-paragraph (e) of paragraph 7 the following:

That the alleged cause of action in said suit is based on certain of the bonds which were involved in the above-entitled action, to-wit: one Series B Bond No. 93 in the face amount of $500.00; one Series B Bond No. 97 in the face amount of $500.00. That this Court in final decree, adjudged and held that all bonds held by Phoenix Finance Corporation were invalid, fraudulent and issued without consideration, and that this Court found certain bonds which had been issued to Helmer Anderson in the total amount of $7400.00 to be valid to the extent of $6000.00 [fol. 113] only, and directed that said sum of $6000.00 be paid from income of the bridge company; that said Series B Bonds Nos. 93 and 97, upon which suit has been commenced in the State of Delaware, as hereinbefore set forth, are portions of the $7400.00 of the bonds issued to Helmer Anderson and allowed in part by this Court as aforesaid.

(4) By adding to sub-paragraph (f) of paragraph 7 the following:

That the alleged cause of action in said suit is based on a claim that the Phoenix Finance Corporation on June 22, 1931 purchased from the defendant certain toll bridge tickets of denominations aggregating $5000.00; that said toll tickets were on June 27, 1939 tendered and presented to an agent or employee of the defendant with a request that they be accepted for toll charged and that they were

not so accepted: that a demand was made upon the defendant to honor an alleged contract assumed by it when said tickets were sold to the assignor of Phoenix Finance Corporation, said Phoenix Finance Corporation claiming damages in the sum of $5000.00. That said sum of $5000.00 referred to and recovery of which is asked in said action was involved in the accounts between the defendant, Phoenix Finance Corporation, Phoenix Finance System, Inc. and Thompson and Company, all of which entered into and were fully determined by this court in the above entitled action; and that since the entry of the decree in the above entitled action there have been no business transactions whatsoever between the defendant, Iowa-Wisconsin Bridge Company and Phoenix Finance Corporation or its predecessor.

(5) By striking out all of paragraph 8 except the words "This defendant alleged that it has had no business with the said Phoenix Finance Corporation since the commencecement of this action."

FRED A. ONTJES,
WILLIAM C. GREEN,
Attorneys for Defendant,
Iowa-Wisconsin Bridge Company.

[fol. 114] United States of America,
United States District Court,
Northern District of Iowa—ss.:

Fred A. Ontjes and William C. Green being first duly sworn each for himself deposes and says that he is one of the attorneys for the defendant in the above entitled action; that he has read the above and foregoing amendment to supplemental and ancillary bill of complaint and knows the contents thereof and that the same is true.

FRED A. ONTJES,
WILLIAM C. GREEN.

Subscribed and sworn to before me this 28th day of September, A. D. 1939.

(Seal)

LEE McNEELY,
Clerk of the U. S. District Court,
Northern District of Iowa.

Filed in the District Court, September 28, 1939.

[fol. 115] (Motion of Iowa-Wisconsin Bridge Company for Preliminary Injunction.)

Comes now Iowa-Wisconsin Bridge Company, the defendant in the above entitled action by Fred A. Ontjes and W. C. Green, its attorneys, and moves the court to grant a Writ of Injunction against the defendant Phoenix Finance Corporation, its officers, agents, servants, employees and attorneys and all those acting by or through or for it or them pending this suit and until the further order of the court, conformable to the prayer of the Supplemental and Ancillary Bill of defendant Iowa-Wisconsin Bridge Company on file.

F. A. ONTJES,
W. C. GREEN,
Attorneys for defendant,
Iowa-Wisconsin Bridge Co.

Filed in the District Court, September 18, 1939.

[fol. 116] (Order Fixing Time for Hearing of Motion for Preliminary Injunction.)

This cause came on for hearing on the motion of the defendant, Iowa-Wisconsin Bridge Company, to fix the time for hearing of application and motion for preliminary injunction herein, the defendant, Iowa-Wisconsin Bridge Company appearing by its attorney, F. A. Ontjes, and the Phoenix Finance Corporation, Complainant, appearing by its attorney, Casper Schenk, and the Court being fully advised in the premises, it is hereby

Ordered that the said application and motion be heard before the District Court of the United States, in the United States Court Room, in the City of Cedar Rapids, State of Iowa, on the 28th day of September, 1939, at two o'clock P. M., and that ten days' notice of this order be served on the Phoenix Finance Corporation, complainant, by service of the same on Casper Schenk as its resident agent and as its attorney of record.

Dated this 18th day of September, A. D. 1939.

GEO. C. SCOTT,
United States District Judge.

Filed in the District Court, September 18, 1939.

[fol. 117] (Notice of Hearing of Motion for Preliminary Injunction.)

To Phoenix Finance Corporation and to Casper Schenk, its attorney:

Please Take Notice that upon the verified Supplemental and Ancillary bill of defendant on file in the above entitled cause and the exhibits and papers referred to in said Supplemental and Ancillary Bill and upon all the records and files in the above entitled action and upon such affidavits and further evidence as the defendant may offer in the United States Court Room in the Federal Building in the City of Cedar Rapids, State of Iowa, on the 28th day of September, 1939 at 2 o'clock P. M. or as soon thereafter as the same can be heard by the court the application and motion of defendant, Iowa-Wisconsin Bridge Company for preliminary injunction against the complainant Phoenix Finance Corporation in accordance with the prayer of said Supplemental and Ancillary Bill and for such other and further relief in the premises as to the court may seem just and proper will be heard; that an order has been entered by the court fixing said time and place for hearing, copy of which order is hereto attached marked Exhibit A and made a part hereof.

Dated this 18th day of September A. D. 1939.

F. A. ONTJES,
W. C. GREEN,
Attorneys for defendant,
Iowa-Wis. Bridge Co.

[fol. 118] Exhibit A.

(Order Fixing Time of Hearing and Notice.)

This cause came on for hearing on the motion of the defendant, Iowa-Wisconsin Bridge Company to fix the time for hearing of application and motion for preliminary injunction herein, the defendant, Iowa-Wisconsin Bridge Company appearing by its attorney, F. A. Ontjes, and the Phoenix Finance Corporation Complainant, appearing by its attorney, Casper Schenk, and the Court being fully advised in the premises, it is hereby

Ordered that the said application and motion be heard before the District Court of the United States, in the United States Court Room, in the City of Cedar Rapids, State of Iowa, on the 28th day of September, 1939, at two o'clock P. M., and that ten days' notice of this order be served on the Phoenix Finance Corporation, complainant, by service of the same on Casper Schenk as its resident agent and as its attorney of record.

Dated this 18th day of September, A. D. 1939.

GEO. C. SCOTT,
United States District Judge.

[fol. 119] (Marshal's Return.)

This Notice came into my hands at Waterloo, Iowa, on September 18, 1939 and I served the Phoenix Finance Corporation by delivering a true copy of this notice after the reading thereof was waived upon Casper Schenk who is the registered resident agent in Iowa for the said Phoenix Finance Corporation on September 18, 1939.

I also served Casper Schenk, its Attorney of Record, by delivering to him a true copy of this Notice after the reading thereof was waived at Waterloo, Iowa, on September 18, 1939.

JOHN B. KEEFE,
United States Marshal.

Filed in the District Court, September 18, 1939.

[fol. 120] Affidavit in Support of Motion for Preliminary Injunction.

Comes now the Iowa-Wisconsin Bridge Company and in further support of its motion for preliminary injunction presents the affidavit which is hereto attached, marked Exhibit "A" and made a part hereof.

F. A. ONTJES,
W. C. GREEN,
Attorneys for Defendant,
Iowa-Wisconsin Bridge Company.

Filed in the District Court, September 28, 1939.

[fol. 121] Exhibit "A".

State of Iowa,
Cerro Gordo County.—ss.:

F. A. Ontjes and W. C. Green, being first duly sworn each for himself deposes and says that he is one of the attorneys for the defendant in the above entitled action; that since the preparation of the Supplemental and Ancillary Bill herein and on the same day said supplemental and Ancillary Bill was filed in the office of the Clerk of this Court, to-wit; on the 18th day of September, 1939, there were filed in the Superior Court of the State of Delaware in and for New Castle County the cases referred to in sub-paragraphs C and E of paragraph seven of the Supplemental and Ancillary Bill declarations and affidavits of demand and in the cases referred to in sub-paragraphs D and F of said paragraph seven, declarations setting forth the claimed causes of action of Phoenix Finance Corporation in said suits; that the alleged cause of action in the suit referred to in sub-paragraph C aforesaid is based upon an alleged promissory note of $500.00 dated December 31, 1932, an alleged promissory note for $12,110.19 dated July 7, 1933, an alleged claim for $15,000 for money claimed to have been lent and advanced by defendant to plaintiff in that case and upon an alleged claim for $7000.00 claimed to have been for money due and payable from the defendant to the plaintiff in that case, Phoenix Finance Corporation, for interest and forbearance. That the said alleged promissory notes of $500.00 and $12,110.19 were involved in the above entitled cause and the adjudication thereof; that in this cause it was claimed that said notes and the alleged considerations therefor formed part of the consideration for the issuance of $20,100 of bonds involved in this action. That this court found that the said bonds were fraudulently issued and wholly without consideration and were more [fol. 122] than offset by indebtedness of Phoenix Finance Corporation and its predecessor, Phoenix Finance System, Inc., to this defendant, Iowa-Wisconsin Bridge Company. That as to the alleged claim for $15,000.00 this a mere restatement of the alleged cause of action on the notes aforesaid stated in different form and in the alternative and the alleged claim for $7000.00 is merely a claim for interest on

the notes aforesaid set in a different form and in the alternative. That all of the alleged claims were involved in and adjudicated in the above entitled cause in this court. That the case referred to in sub-paragraph D of said paragraph seven of the Supplemental and Ancillary Bill is based on an alleged agreement claimed to have been entered into between Phoenix Finance System, Inc., John W. Shaffer and Company and Iowa-Wisconsin Bridge Company dated November 10, 1930, under and by virtue of which said Phoenix Finance Corporation claims defendant became indebted to Phoenix Finance System, Inc., in the sum of $21,262.71, claims to be the assignee of said Phoenix Finance System, Inc., and claims the total sum of $50,000.00 for principal and interest; that attached to the declarations in said case is a copy of said purported agreement. That said agreement so referred to in said declaration and sued upon is the same agreement described and referred to by the court in its finding of fact #24, appearing at pages 13, 14 and 15 of Exhibit B attached to the Supplemental and Ancillary Bill of Complaint, which the court found to be without consideration, a fraud upon the bridge company, void and ultra vires.

That the case referred to in sub-paragraph E of said paragraph seven is based upon certain of the bonds which were involved in the above entitled action, to-wit: one Series B Bond No. 93 in the face amount of $500.00; one Series B Bond No. 97 in the face amount of $500.00.

[fol. 123] This Court in its final decree adjudged and held that all bonds held by Phoenix Finance Corporation were invalid, fraudulent and issued without consideration, and this Court found certain bonds which had been issued to Helmer Anderson in the total amount of $7400.00 to be valid to the extent of $6,000.00 only, and directed that said sum of $6,000.00 be paid from income of the bridge company. That said Series B Bonds numbers 93 and 97 upon which suit has been commenced in the State of Delaware as hereinbefore set forth are a portion of the $7400.00 of the bonds issued to Helmer Anderson and allowed in part by this Court as aforesaid.

That the case referred to in sub-paragraph F of said paragraph seven is based upon a claim that the Phoenix

Finance Corporation on June 22, 1931 purchased from the defendant certain toll bridge tickets of denominations aggregating $5000.00; that said toll tickets were on June 27, 1939, tendered and presented to an agent or employee of the defendant with a request that they be accepted for toll charges and that they were not so accepted; that a demand was made upon the defendant to honor an alleged contract assumed by it when said tickets were sold to the assignor of Phoenix Finance Corporation, said Phoenix Finance Corporation claiming damages in the sum of $5000.00. That said sum of $5000.00 referred to and recovery of which is asked in said action was involved in the accounts between the defendant, Phoenix Finance Corporation, Phoenix Finance System, Inc. and Thompson and Company, all of which entered into and were fully determined by this court in the above entitled action; and that as is set forth in the Supplemental and Ancillary Bill of Complaint, since the entry of the decree in the above entitled action there have been no business transactions whatsoever between the defendant Iowa-Wisconsin Bridge Company and Phoenix Finance Corporation or its predecessor.

[fol. 124] That attached to this Affidavit and made a part hereof, as Exhibits 1, 1-a, 2, 3, 3-a, 4, 5, 5-a, and 6, are copies of the declarations, and in the cases where affidavits of demand were filed, such affidavits of demand, filed in the Courts of the State of Delaware, in the cases referred to in paragraphs A, B, C, D, E, and F of paragraph seven of the Supplemental and Ancillary Bill of Complaint herein.

F. A. ONTJES,
W. C. GREEN,
Attorneys for Defendant,
Iowa-Wisconsin Bridge Co.

Subscribed and sworn to before me by the said F. A. Ontjes and W. C. Green this 27th day of September, A. D. 1939.

BESSIE G. ENGLE,
Deputy Clerk, U. S. District Court,
Northern District of Iowa.

(Seal)

My Commission expires .....

[fol. 125] Exhibit "6".

In the Superior Court of the State of Delaware In and For New Castle County.

September Term, 1939.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 159. vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

New Castle County:—ss.:

Iowa-Wisconsin Bridge Company, a corporation of the State of Delaware, the defendant in this suit, was summoned to answer Phoenix Finance Corporation, a corporation of the State of Delaware, the plaintiff in this suit, of a plea of trespass on the case, and thereupon the said plaintiff, by Marvel, Morford & Logan, its attorneys, complains:

For That Whereas, the said defendant at all the times herein mentioned was and is the owner and proprietor of a certain toll bridge crossing the Mississippi River at Lansing, Iowa, known as the Black Hawk Bridge, and that heretofore, to-wit, on the 22nd day of June, A. D., 1931, at Allamakee County, State of Iowa, to-wit, at New Castle County aforesaid, Thompson & Co., a body corporate, purchased from the defendant toll bridge tickets for said Black Hawk Bridge of denominations aggregating Five Thousand Dollars ($5,000.00), lawful money of the United States of America, and thereupon paid to the said defendant the sum of Five Thousand Dollars ($5,000.00) therefor; that said toll bridge tickets so purchased by Thompson & Co. were contained in one thousand (1,000) toll ticket books, each containing Five Dollars ($5.00) in face value of toll tickets, said books bearing serial numbers 601 to 800 inclusive, and 1,701 to 2,500 inclusive; that each of said one thousand (1,000) toll ticket books was and is in words, figures and contents identical each with the other except that each book [fol. 126] has and had a separate serial number stamped on the cover thereof; that each such book contained six

red tickets, each of the value of fifty cents, four blue tickets, each of the value of twenty-five cents, and ten orange tickets, each of the value of ten cents. By reason of the foregoing, the said Thompson & Co. so purchased from the defendant six thousand (6,000) of said toll bridge tickets of the denomination or value of fifty cents, four thousand (4,000) of said toll bridge tickets of the denomination or value of twenty-five cents, and ten thousand (10,000) of said toll bridge tickets of the denomination or value of ten cents, and that attached hereto, marked Exhibit "A" and by this reference made a part of this declaration are photostat copies of the bridge toll tickets of each of said denominations, and the plaintiff says that each ticket so sold to Thompson & Co. is the same as the photostat of the ticket of the corresponding denomination as so shown by Exhibit "A".

And the said plaintiff further says that by reason of the premises, the said defendant, in manner and form as aforesaid and at the time and place aforesaid, undertook and faithfully promised said Thompson & Co. that it would honor and accept said toll bridge tickets upon presentation thereof for the payment of toll charges for the passage of vehicles and passengers over said Black Hawk Bridge.

And the said plaintiff further says that thereafter, to-wit, on or about the 1st day of October, A. D., 1931, said Thompson & Co., for a valuable consideration, assigned, transferred and set over to the plaintiff herein all of its right, title and interest in and to said toll bridge tickets and delivered the same to the said plaintiff; that thereafter, to-wit, on the 27th day of June, A. D. 1939, the said plaintiff, by and through its agent or representative, tendered and presented all of said toll bridge tickets to the agent or employee of the defendant in charge of the taking of toll over said Black Hawk Bridge with the request that the defendant's said employee choose from said tickets a sufficient number thereof in the amount and denomination to pay the charge for toll over the Black Hawk Bridge of the plaintiff's said agent or representative an automobile then and [fol. 127] and there in charge of the plaintiff's said agent or representative and passengers therein contained, but that the defendant's said agent then and there refused to

accept said tender or any part thereof for the payment of tolls, and the plaintiff's said agent or representative was thereupon required to pay and did pay to the defendant's agent the sum of fifty cents in cash, representing the toll charged by the defendant at the time aforesaid for passage over the Black Hawk Bridge for the plaintiff's agent or representative, said automobile and the passengers therein contained.

That thereafter, to-wit, on the 8th day of July, 1939, the plaintiff, by its attorneys, made written demand upon the defendant by a registered communication duly received by the defendant, in words and figures as follows, to-wit:

"Iowa-Wisconsin Bridge Company,
Lansing, Iowa.

Gentlemen:

On or about June 22, 1931, Thompson & Co. purchased from your Company Black Hawk Bridge toll ticket books Nos. 601 to 800, both inclusive, and 1701 to 2500, both inclusive, making a total of 1000 toll ticket books, each containing $5 face value of toll tickets. For these toll tickets, Thompson & Co. paid your Company on or about the above mentioned date the sum of $5000. The toll bridge tickets included in the above mentioned books are at 50¢. 25¢ and 10¢. denominations. Four your further information, you are advised that each of the 1000 toll ticket books is exactly alike except that each has its own separate serial number stamped upon its cover and each book alike contains six red tickets each of 50¢ value, four blue tickets each of 25¢ value, and ten orange tickets each of 10¢ value.

You are advised that Phoenix Finance Corporation succeeded to all of the rights of Thompson & Co. with respect to these toll tickets, and on August 4, 1937, said last mentioned Company addressed a letter to Oscar R. Thorson, Receiver, with respect to the contemplated disposal of said tickets, and a true and correct copy of said letter is attached hereto for your information. Mr. Thorson responded under date of August 7, 1937, and thereby Phoenix Finance Corporation was advised that the toll takers at the Bridge would not honor such toll tickets. A true and correct copy

of Mr. Thorson's reply of August 7th is also enclosed herewith for your information.

Subsequently on June 27, 1939, a representative of Phoenix Finance Corporation tendered the above mentioned toll ticket books to the toll taker at the Black Hawk Bridge in payment of toll, and such toll taker refused to accept the tender or any part thereof in payment of the charge for passage over this Bridge. In so refusing to accept these toll tickets or any of the same for passage over the Bridge, the toll taker stated substantially as follows:

[fol. 128] 'My superiors who have charge of this Bridge have instructed me to refuse all of these toll tickets and not to honor any of them for the payment of tolls over this Bridge.'

Demand is hereby made upon you to honor the contract assumed by you when these tickets were sold to the assignor of Phoenix Finance Corporation and that we be advised that these tickets will be honored in their respective denominations for passage over the Bridge at the usual and prevailing rates, or in the alternative that you pay to Phoenix Finance Corporation as the successor to the rights of Thompson & Co. the sum of $5,000 plus lawful interest thereon from the 22nd day of June, 1931.

You are requested to advise the undersigned by return mail whether or not your Company will honor these toll tickets, or in the alternative pay the above mentioned sum of money.

Very truly yours,

MARVEL, MORFORD & LOGAN,
Attorneys for Phoenix Finance Corporation."

And the said plaintiff further says that the defendant has wholly failed and refused to acknowledge said last mentioned demand or to advise the plaintiff that said toll tickets would be acceptable for passage over the Black Hawk Bridge, and by reason of the premises the plaintiff says that the defendant, upon presentation, tender and demand, as aforesaid, has refused to honor and accept said toll bridge tickets, or any part thereof, for the payment of toll charges for the passage of vehicles and passengers over said Black Hawk Bridge, owned by it as aforesaid, and by

reason of the premises, the plaintiff says that it is injured and has sustained damage in the sum of Five Thousand Dollars ($5,000), lawful money of the United States of America, with lawful interest thereon from the 22nd day of June, A. D., 1931, and therefore it brings its suit, etc.

MARVEL, MORFORD & LOGAN,
Attorneys for Plaintiff.

[fol. 129] "Black Hawk Bridge

Crossing - - - - - - - Mississippi

Lansing, Iowa - - - - - De Soto, Wis.

50¢

Iowa-Wisconsin Bridge Co."

"Black Hawk Bridge

Crossing - - - - - - - Mississippi

Lansing, Iowa - - - - - De Soto, Wis.

25¢

Iowa-Wisconsin Bridge Co."

"Black Hawk Bridge

Crossing - - - - - - - Mississippi

Lansing, Iowa - - - - - De Soto, Wis.

10¢

Iowa-Wisconsin Bridge Co."

[fol. 130] (Note by the Clerk of the District Court: Copies of certain other exhibits which are attached to and made a part of the original of the foregoing Affidavit in Support of Motion for Preliminary Injunction are omitted here because they are a part of Exhibits S. C.-1, S. C-2, S. C.-3, S. C.-4 and S. C.-5 which are shown at folio pages 393 to 468 of this transcript.)

[fol. 131] (Resistance of Phoenix Finance Corporation to Application and Motion for Preliminary Injunction.)

Now comes Phoenix Finance Corporation, one of the complainants above named and the defendant in the supplemental and ancillary bill filed in this cause, and specifically reserving all right of objection to the jurisdiction of this Court to grant the relief prayed in said supplemental and ancillary bill, respectfully shows to the Court that said application and motion for a preliminary injunction as prayed in said supplemental and ancillary bill should be denied for the following reasons:

1. That Iowa-Wisconsin Bridge Company, the complainant in the supplemental and ancillary bill, and the defendant in the cause pending in the Superior Court of the State of Delaware, set forth in paragraph (7)(a) of the supplemental and ancillary bill, has appeared generally and by counsel in said cause, pleaded to the plaintiff's declaration therein, including inter alia the plea of res adjudicata, has tried said cause on the merits thereof before the judges of the Superior Court of the State of Delaware in and for Newcastle County after having formally waived trial by jury and after having waived by stipulation all defenses, including want of consideration, except said plea of res adjudicata, and by and through its counsel has argued orally and has filed both original and reply briefs in support of its said plea, said cause being now under consideration, and as yet undetermined by the judges of said Court.

2. That Iowa-Wisconsin Bridge Company, the complainant in the supplemental and ancillary bill and the defendant in the cause pending in the Court of Chancery of

the State of Delaware, set forth in paragraph (7)(b) of the [fol. 132] supplemental and ancillary bill, has appeared generally by its solicitors in said cause and has filed an answer to the bill of complaint therein, which said answer, by its terms, formally raises, presents and pleads the defense of res adjudicata or estoppel by the record of the proceeding and decree in the above stated cause.

3. That Iowa-Wisconsin Bridge Company, the complainant in the supplemental and ancillary bill filed in this cause and the defendant in the causes alleged in paragraphs (7)(c), (7)(d), (7)(e) and (7)(f) of the supplemental and ancillary bill, which causes are pending in the Superior Court of the State of Delaware in and for Newcastle County, has caused general appearances to be entered by its attorneys in each of said causes and in the causes set forth in paragraphs (7)(c) and (7)(e), has applied to the Court and has obtained extensions of time for filing affidavits of defense until October 3, 1939, and that in all of said causes, if the allegations of fact and the conclusions of law as stated and advanced in the supplemental and ancillary bill are true and correct, Iowa-Wisconsin Bridge Company has adequate and complete defenses by way of res adjudicata or estoppel by the decree in the cause above mentioned.

4. That it does not appear from the supplemental and ancillary bill that the causes of action stated in paragraphs (7)(a), (7)(b), (7)(c), (7)(d), (7)(e) and (7)(f) thereof, or any of them, relate to an issue or issues adjudicated in fact by this Court in its decree in the cause above stated; [fol. 133] that particularly with respect to the causes stated in paragraphs (7)(c), (7)(d), (7)(e) and (7)(f), no facts are alleged in the supplemental and ancillary bill to show what issues are tendered thereby, and that the allegations of the supplemental and ancillary bill with respect thereto are otherwise indefinite, uncertain and insufficient.

5. That there has been no adjudication by this Court of the issues tendered in the several causes of action pending in the Delaware Courts and referred to in paragraphs

(7)(a) and (7)(b) of the supplemental and ancillary bill, in that Phoenix Finance Corporation, the defendant in said supplemental and ancillary bill, was not such a party to the above stated cause that this Court could make such a valid adjudication on said issues against it as to be entitled to full faith and credit either in the courts of the State of Delaware or elsewhere.

6. That none of the issues tendered in the causes in the Delaware Courts as set forth in paragraphs (7)(a), (7)(b), (7)(c), (7)(d), (7)(e) and (7)(f) of the supplemental and ancillary bill were tendered or validly adjudicated in the above stated cause, in that Phoenix Finance Corporation was not an indispensable party in said cause, said issues were not tendered in fact by the pleadings therein, and, having no knowledge or intimation that there would be a purported adjudication on said issues, Phoenix Finance Corporation did not offer and has had no opportunity to offer testimony on its behalf with respect thereto.

[fol. 134] 7. That the cause of action mentioned in paragraph (7)(b) of the supplemental and ancillary bill relates to a matter concerning the internal management and corporate structure of Iowa-Wisconsin Bridge Company, a corporation of the State of Delaware, and presents an issue solely within the jurisdiction of the Court of Chancery of the State of Delaware and solely cognizable thereby; that the causes of action mentioned in paragraphs (7)(a) (7)(c), (7)(d), (7)(e) and (7)(f) of the supplemental and ancillary bill are for money judgments only and belong solely within the jurisdiction of the law courts, where Iowa-Wisconsin Bridge Company is amenable to service of process; that said actions having been brought in the Superior Court of the State of Delaware, a law court of general civil jurisdiction, and Iowa-Wisconsin Bridge Company having been properly served with process therein, said Superior Court has jurisdiction thereof; that if, as contended by the complainant in the supplemental and ancillary bill, there has heretofore been a valid adjudication in this Court of all the issues tendered in said causes, which adjudication is binding upon Phoenix Finance Corporation as a party to said cause and which adjudication is entitled to full faith and credit under the Constitution of the United States, said complainant, Iowa-Wisconsin

Bridge Company, as the defendant in said Delaware actions, has a full, adequate and complete defense in each such action, to-wit, the defense of res adjudicata or estoppel by decree; and that this Court, sitting as a Court of Equity, should not interfere to restrain the prosecution of [fol. 135] said actions upon the mere legal grounds available to Iowa-Wisconsin Bridge Company by way of defense therein.

8. That said application and motion and said supplemental and ancillary bill show that the proceedings in the State of Delaware sought to be enjoined as set forth in paragraphs (7)(a), (7)(c), (7)(d), (7)(e) and (7)(f) of the supplemental and ancillary bill are simple actions in personam at law to establish legal liability and are for money judgments only, and that the proceeding mentioned in paragraph (7)(b) of the supplemental and ancillary bill concerns a matter peculiarly within the jurisdiction of the Court of Chancery of the State of Delaware; that said proceedings do not, and will not tend to defeat nor impair this Court's jurisdiction over the above entitled foreclosure suit nor the decree entered therein; nor do they affect the Court's control, possession or disposition of the properties formerly held by the mortgage trustees and now in the possession of this Court; that the movant has clear, adequate, and speedy remedies both at law and in said equity cause and that its said application is without equity.

9. That the injunctive relief sought by the supplemental and ancillary bill is prohibited by Section 265 of the Judicial Code of the United States.

10. That in the above stated cause this Court held that Phoenix Finance Corporation, the defendant to said sup- [fol. 136] plemental and ancillary bill, was "not an indispensable party," but merely a "nominal or formal party," and that, even though it were a citizen of the same State as Iowa-Wisconsin Bridge Company, its presence did not oust the jurisdiction of this Court; that the decree entered in said cause by virtue of the jurisdiction so announced, adjudicated solely the right to a foreclosure of a mortgage deed of trust concerning property the possession of and title to which stood in the name of said complainant trus-

tees; that the legal title to the notes, accounts, and choses in action against the Iowa-Wisconsin Bridge Company and belonging to Phoenix Finance Corporation, were never in the possession of said trustees; that said trustees had neither right, title nor interest in them, nor any duty in respect to them; that said trustees could not and did not represent Phoenix Finance Corporation in respect to its said notes, accounts and choses in action; that said decree in said foreclosure cause did not, and could not, adjudicate the rights of Phoenix Finance Corporation nor the liabilities of Iowa-Wisconsin Bridge Company with respect to such notes, accounts and choses in action in a suit to which it was merely a nominal and formal party; that said decree against said trustees could not and did not constitute an adjudication by representation or otherwise, with respect to such notes, accounts, and choses in action which were not, never were, and are not part of the trust res before the Court; and that, under the Constitution of the United States, Phoenix Finance Corporation could not lawfully be deprived of its said property and property rights without due process of law, in a judicial proceeding to which it was an indispensable party and pursuant to issues properly pleaded, of which it had notice and with [fol. 137] respect to which it had an opportunity to offer testimony in its behalf.

11. That the supplemental and ancillary bill does not show either an actual or theoretical inadequacy of legal or other remedy nor any facts to move the sound discretion of this Court, sitting as a court of equity.

12. That there is no practical necessity for the granting of injunctive relief as prayed in the supplemental and ancillary bill and there is no lawful justification for the assumption that, and no reason why, Iowa-Wisconsin Bridge Company cannot maintain the same rights and defenses in the courts of its domicile as in this Court.

13. That for the reasons herein stated Phoenix Finance Corporation is not disregarding any adjudication, order or decree of this Court; that the Delaware litigation to which reference is made in the supplemental and ancillary bill is not for the purpose of attempting to invalidate and nullify any decree or order of this Court, is not for the purpose of

depriving Iowa Wisconsin Bridge Company of the fruits of any adjudication and is not for the purpose of harassing, vexing, annoying and destroying business of said company; that Phoenix Finance Corporation is not prosecuting and has no intention of prosecuting any suits or actions in Delaware or elsewhere involving matters fully and finally determined by this Court; that it may properly maintain and prosecute, either in the court of the domicile of Iowa-Wisconsin Bridge Company or elsewhere, where proper service may be obtained, (except in the Federal Courts) actions, in personam, against Iowa-Wisconsin Bridge Company to enforce the liabilities of said company upon its contracts and other personal obligations and, for [fol. 138] the reasons above stated, may sue in the Court of Chancery of Delaware to require the reissuance to it of the 517 shares of the preferred stock of Iowa-Wisconsin Bridge Company unlawfully withheld from it by said Company; and that such actions, suits and proceedings may not now, nor at any time could have been maintained or prosecuted in this or in any other Federal Court, because of the lack of diversity of citizenship between Phoenix Finance Corporation and Iowa-Wisconsin Bridge Company, both corporations of the State of Delaware as aforesaid.

14. In order that the Court may be advised with respect to the nature and character of the suits in the Superior Court of The State of Delaware, indefinitely described in paragraphs (7) (c), (7) (d), (7) (e) and (7) (f) of the supplemental and ancillary bill, Phoenix Finance Corporation has filed with this resistance true and correct copies of the declarations filed therein, which declarations fully define the causes of action sought to be asserted by Phoenix Finance Corporation. For convenient reference to the corresponding paragraphs of the supplemental and ancillary bill said declarations are marked "(7) (c)", "(7) (d)", "(7) (e)" and "(7) (f)" respectively.

Wherefore, Phoenix Finance Corporation respectfully prays that said application and motion for preliminary injunction be denied at movant's cost.

JAMES R. MORFORD,
CASPER SCHENK,
Attorneys for Phoenix Finance Corporation.

[fol. 139] State of Iowa,
Linn County—ss.:

James R. Morford being duly sworn deposes and says that he is one of the Attorneys for Phoenix Finance Corporation in the above entitled cause; that he has read the above and foregoing Resistance to the Application and Motion for a preliminary injunction and that the facts set forth therein are true as he verily believes.

JAMES R. MORFORD.

Subscribed and sworn to before me by the said James R. Morford this 28th day of September, A. D. 1939.

ETHEL J. BARRETT,
(Seal) Notary Public in and for Linn County, Iowa.

My commission expires July 4, 1942.

Filed in the District Court September 28, 1939.

[fol. 140] (Note by the clerk of the District Court: Exhibits 7 (c), 7 (d) and 7 (e) which are a part of Resistance of Phoenix Finance Corporation to application and motion of Iowa-Wisconsin Bridge Company for preliminary injunction are omitted here because 7 (c) is a part of Exhibit SC-103 which begins at folio page 596; 7 (d) is a part of Exhibit SC-104 which begins at folio page 650; and 7 (e) is a part of Exhibit SC-105 which begins at folio page 677, of this transcript.)

[fol. 141] (Extract from reporter's transcript of hearing at Cedar Rapids, September 28, 1939, on motion for preliminary injunction.)

Mr. Ontjes: "* * * We further offer in evidence in support of the bill the affidavits filed to it in further support of the preliminary injunction of F. A. Ontjes and W. C. Green, the original of which has been filed and a copy of which is in the possession of the defendant—plaintiffs here I mean, together with the exhibits attached to such affidavits, in evidence.

It is unnecessary to encumber this record, of course, to ask the court to take judicial notice of the records and files in this cause, including the testimony and the exhibits and the previous orders and findings of this court, and I don't think it is necessary to do so, but we ask that those be taken into judicial account in passing on the sufficiency of this bill. The bill, Your Honor, that is the sum of our evidence." " "

[fol. 142] (Leave granted to file Amendment to Supplemental and Ancillary Bill; Motion for Preliminary Injunction submitted.)

On the 28th day of September, 1939, the above cause came before the Court in open session at Cedar Rapids pursuant to the assignment therefor, upon the motion of the defendant Iowa-Wisconsin Bridge Company for a preliminary injunction and upon the resistance thereto by Phoenix Finance Corporation, Complainant; thereupon Vernon L. Grant, Esquire, is appointed shorthand reporter for the hearing and is sworn to completely and truthfully report and transcribe the testimony offered at the hearing; the defendant Iowa-Wisconsin Bridge Company appears by F. A. Ontjes, Esquire, and W. C. Green, Esquire, its counsel, and the complainant, Phoenix Finance Corporation, appears by Casper Schenk, Esquire, James R. Morford, Esquire, and H. W. Norman, Esquire, its counsel; thereupon evidence is offered by the defendant and by the intervener, and the motion and resistance thereto are argued by counsel, and the defendant, Iowa-Wisconsin Bridge Company, on its motion is granted leave to file amendment to supplemental and ancillary bill of complaint, which said amendment is forthwith filed; thereupon It is Ordered that the Phoenix Finance Corporation shall file its answer to the supplemental and ancillary bill of complaint and the amendment thereto within ten days from this date; thereupon said motion and resistance thereto are fully submitted and by the Court taken under advisement subject to filing of briefs by both sides within five days; and the reporter to have his transcript on file in five days.

Filed in the District Court September 28, 1939.

[fol. 143] (Findings of Fact and Conclusions of Law of District Court on Motion for Preliminary Injunction.)

The above-entitled cause came on for hearing before the Court on the 28th day of September, 1939, it being the third day of the September 1939 Term of this Court at Cedar Rapids, Iowa, on the motion of the defendant Iowa-Wisconsin Bridge Company for a preliminary injunction; F. A. Ontjes and W. C. Green, appearing as attorneys for said Iowa-Wisconsin Bridge Company; and James R. Morford, and H. W. Norman and Casper Schenk, appearing as attorneys for the Phoenix Finance Corporation, one of the complainants; and said matter was heard upon the verified supplemental and ancillary bill of defendant and amendment thereto on file in the above-entitled cause, the exhibits and papers referred to in said supplemental and ancillary bill, and joint affidavit of F. A. Ontjes and W. C. Green, all the records and files in the above-entitled action on the part of said defendant; and upon the resistance on part of said complainant Phoenix Finance Corporation;

Now after having heard counsel, the Court being fully advised in the premises makes the following Findings of Facts:

One.

The Court finds that notice of motion for leave to file supplemental and ancillary bill in this cause dated September 11th, 1939, was duly served on the complainant Phoenix Finance Corporation by service of said notice, with copy of said supplemental and ancillary bill attached, on Casper Schenk, resident agent of said corporation in the State of Iowa, and upon said Casper Schenk as attorney of record for said corporation, on the 12th day of September, 1939, for hearing of said motion on the 18th day of September, 1939, at 3 o'clock P. M., before this Court in the United States Court Room at Waterloo, Iowa.

[fol. 144] Two.

That on the 18th day of September, 1939, at 3 o'clock P. M. said motion came on for hearing, and on said date an order was entered, this Court granting leave to the said defendant to file said supplemental and ancillary bill; that

on said day, said defendant filed an application and motion for preliminary injunction, and this Court entered on order that said application and motion be heard before this Court in the United States Court Room in the City of Cedar Rapids, State of Iowa, on the 28th day of September, 1939, at 2 o'clock P. M., and that ten days' notice of such order be served on the Phoenix Finance Corporation by service of the same on Casper Schenk as its resident agent and as its attorney of record; that such notice was served on the 18th day of September, 1939 on the complainant Phoenix Finance Corporation as directed in said order, at Waterloo, Iowa.

Three.

That the above entitled cause was commenced by the Bechtel Trust Company (now First Trust & Savings Bank) and A. H. Schubert as trustees on an alleged deed of trust and bonds at the request and instigation of the complainant Phoenix Finance Corporation against the Iowa-Wisconsin Bridge Company and that a receiver was appointed of all the property of the bridge company and that thereafter petitions of intervention were filed by the above named interveners with leave and by order of court to defend said action; and the Phoenix Finance Corporation made a party complainant by order of court; and that said cause was heard and decree rendered as hereinafter set forth.

Four.

That on the 1st day of December 1936 the court filed its opinion and findings of fact and final decree, which was entered of record. That by said final decree all matters and differences between the complainant Phoenix Finance Corporation and its predecessor, Phoenix Finance System, Inc. on the one hand and the defendant Iowa-Wisconsin Bridge Company on the other, were fully settled, adjudicated and determined, and that since the entry of said decree there have been no business transactions whatsoever between said defendant Iowa-Wisconsin Bridge Company and said complainant Phoenix Finance Corporation or its predecessor.

[fol. 145] Five.

That following the entry of the decree aforesaid the complainant Phoenix Finance Corporation filed a petition for rehearing and prayed in the alternative that the decree be modified so as to withhold from adjudication the question of the validity of the $50,000 mortgage dated March 10, 1931, by permitting Phoenix Finance Corporation to institute an action at law against the bridge company if it so desired, for money had and received and that there be reinvested in said Phoenix Finance Corporation 517 shares of "A" stock surrendered in exchange for bonds. That the petition for rehearing and for modification of the decree were denied.

Six.

That appeal from the said decree, orders, rulings and adjudication of this Court was taken to the Circuit Court of Appeals of the Eighth Circuit by the above-named complainants, where the same was affirmed. That petition for Writ of Certiorari to the Supreme Court of the United States was denied and the mandate of the Circuit Court of Appeals was issued on the third day of April, 1939, and on the 6th day of April, 1939, was filed and entered in the office of the Clerk of this Court.

Seven.

That the above entitled action was commenced about the 28th day of August, 1933. That a large number of depositions were taken which involved a great deal of time, very voluminous transcripts, hundreds of exhibits; the trial of this cause before the Master involved a number of weeks and at the said trial a large amount of additional oral testimony was taken; that the hearing before this court on exceptions involved months of work and that the hearing before this court to settle the record and of this cause before the Circuit Court of Appeals involved many weeks of additional work; that this cause was defended against the unjust claims of the Phoenix Finance Corporation at great expense to the bridge company and in said action various claims of the Phoenix Finance Corporation were fully heard and adjudicated; that to re-litigate the matters determined, piecemeal or otherwise would subject the

bridge company to great expense and impair its credit and business to its irreparable injury.

[fol. 146] Eight.

That notwithstanding the final adjudication and order of the District Court of the United States for the Northern District of Iowa, the complainant, Phoenix Finance Corporation is disregarding said adjudication and order, and for the purpose of attempting to invalidate and nullify the lawful decree and order of this Court and for the purpose of depriving the defendant of the fruits of said adjudication and for the purpose of harassing, vexing and annoying and destroying the business of the defendant, has commenced and is prosecuting and is about to prosecute in the State of Delaware numerous and divers suits and actions involving the same matters fully and finally determined by this Court, and has further and in contempt of this Court filed for record and recorded the $50,000 mortgage hereinbefore and hereinafter referred to held by this Court to be fraudulent and invalid.

Nine.

That the Phoenix Finance Corporation has commenced and is prosecuting the following suits against the said defendant:

a. Said Phoenix Finance Corporation filed an action entitled Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware versus the Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware in the Superior Court of the State of Delaware in and for New Castle County, being case No. 39 November Term, 1938, the summons of said action being dated September 29, 1938, and the alleged cause of action being based on two certain alleged promissory notes, one of $2000 dated December 15, 1932, and one of $3125 dated January 20, 1933, which were involved in the above entitled cause and the adjudication thereof; that in this cause it was claimed that said notes and the alleged considerations thereof formed part of the consideration for the issuance of $20,100 of the bonds involved in this action. That this Court found that the said bonds were fraudulently issued

and wholly without consideration and were more than offset by indebtedness of Phoenix Finance Corporation and its predecessor, Phoenix Finance System, Inc., to this defendant, Iowa-Wisconsin Bridge Company. That in said cause in Delaware the defendant, Iowa-Wisconsin Bridge Com- [fol. 147] pany interposed the defense of res judicata and other defenses,—such as want of consideration. That said cause was tried on the issue raised by the plea of res judicata, but has not yet been determined by the Delaware Court.

b. That on or about the 20th day of February, 1939, the said Phoenix Finance Corporation commenced an action in the Court of Chancery of the State of Delaware in and for New Castle County entitled Phoenix Finance Corporation, a corporation of the State of Delaware, plaintiff versus Iowa-Wisconsin Bridge Company, a corporation of the State of Delaware, defendant, and caused subpoena to be issued therein and served on said defendant and filed bill of complaint on February 18th, 1939, asking to recover 517 shares of Class "A" stock of the Iowa-Wisconsin Bridge Company, which was surrendered and cancelled at the time said Phoenix Finance Corporation fraudulently procured the issuance of $60,500 of bonds involved in and as found in this action, and which stock this court and the Circuit Court of Appeals ordered, adjudged and found the said Phoenix Finance Corporation was not entitled to have reissued to it. That the defendant has answered in said cause, but that said cause has not been tried.

c. That the said Phoenix Finance Corporation has commenced an action in the Superior Court of Delaware in and for New Castle County entitled Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware versus the Iowa-Wisconsin Bridge Company duly organized and existing under the laws of the State of Delaware, being Case No. 65, September Term, 1939, and has caused summons to be issued against said Iowa-Wisconsin Bridge Company returnable at Wilmington, Delaware, on the 18th day of September next, to answer said Phoenix Finance Corporation of a plea of trespass on the case, etc.; that said summons was caused to be issued on the 22nd day of June, 1939, and served on

the defendant. That the alleged cause of action in said suit is based upon an alleged promissory note of $500.00 dated December 31, 1932, an alleged promissory note for $12,-110.19 dated July 7, 1933, an alleged claim for $15,000 for money claimed to have been lent and advanced by defendant to plaintiff in that case and upon an alleged claim for $7000.00 claimed to have been for money due and payable from the defendant to the plaintiff in that case, Phoenix Finance Corporation, for interest and forbearance. That the said alleged promissory notes of $500.00 and $12,110.19 [fol. 148] were involved in the above entitled cause and the adjudication thereof; that in this cause it was claimed that said notes and the alleged considerations therefor formed part of the consideration for the issuance of $20,100 of bonds involved in this action. That this court found that the said bonds were fraudulently issued and wholly without consideration and were more than offset by indebtedness of Phoenix Finance Corporation and its predecessor, Phoenix Finance System, Inc., to this defendant, Iowa-Wisconsin Bridge Company. That as to the alleged claim for $15,-000.00 this a mere re-statement of the alleged cause of action on the notes aforesaid stated in different form and in the alternative and the alleged claim for $7000.00 is merely a claim for interest on the notes aforesaid set forth in a different form and in the alternative. That all of said alleged claims were involved in and adjudicated in the above-entitled cause in this Court.

d. That the said Phoenix Finance Corporation commenced another action in the Superior Court of Delaware in and for New Castle County entitled Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware versus the Iowa-Wisconsin Bridge Company, duly organized and existing under the laws of the State of Delaware, being case No. 64, September Term, 1939, and caused summons to be issued against said Iowa-Wisconsin Bridge Company returnable at Wilmington, Delaware, on the 18th day of September next to answer said Phoenix Finance Corporation of a plea "that it hold and keep with it the covenant between them made according to the force and effect of said articles of agreement between them, etc." That the said Phoenix Finance Corporation caused said summons to be issued on the 22nd day

of June, 1939, and caused the same to be served on the defendant. That the alleged cause of action in said suit is based on an alleged agreement claimed to have been entered into between Phoenix Finance System, Inc., John W. Shaffer & Company, and Iowa-Wisconsin Bridge Company dated November 10, 1930, under and by virtue of which said Phoenix Finance Corporation claims defendant became indebted to Phoenix Finance System, Inc. in the sum of $21,262.71, claims to be the assignee of said Phoenix Finance System, [fol. 149] Inc. and claims the total sum of $50,000.00 for principal and interest; that attached to the declaration in said case is a copy of said purported agreement. That said agreement so referred to in said declaration and sued upon is the same agreement described and referred to by this court in its finding of fact #24, appearing at pages 13, 14 and 15 of Exhibit B attached to the Supplemental and Ancillary Bill of Complaint, which the Court found to be without consideration, a fraud upon the bridge company, void and ultra vires.

e. That the said Phoenix Finance Corporation commenced another action in the Superior Court of Delaware in and for New Castle County entitled Phoenix Finance Corporation, a Corporation duly organized and existing under the laws of the State of Delaware versus the Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware, being case No. 79, September Term, 1939, and caused summons to be issued against said Iowa-Wisconsin Bridge Company returnable at Wilmington, Delaware, on the 18th day of September next to answer said Phoenix Finance Corporation of a plea of trespass on the case, etc. That said Phoenix Finance Corporation caused said summons to be issued on the 11th day of July, 1939, and served on the defendant. That the alleged cause of action in said suit is based on certain of the bonds which were involved in the above-entitled action, to-wit: one Series B Bond No. 93 in the face amount of $500.00; one Series B. Bond No. 97 in the face amount of $500.00. That this Court in its final decree, adjudged and held that all bonds held by Phoenix Finance Corporation were invalid, fraudulent and issued without consideration, and that this Court found certain bonds which had been issued to Helmer Anderson in the total amount of

$7400.00 to be valid to the extent of $6000.00 only, and directed that said sum of $6000.00 be paid from income of the bridge company; that said Series B. Bonds Nos. 93 and 97, upon which suit has been commenced in the State of Delaware as hereinbefore set forth, are portions of the $7400.00 of the bonds issued to Helmer Anderson and allowed in part by this Court as aforesaid.

Addendum to subdivision (e) of Finding Nine: That sixty-seventy fourths (60 74) of the face value of said bonds with accrued interest to May 1, 1939, has been available since May 1, 1939, and will be paid to the lawful holder of said bonds by the Receiver of this Court on surrender of [fol. 150] said bonds.

f. That all ultimate facts and [issued] involved and presented in each of the actions now pending in the Court of the State of Delaware and brought by the Phoenix Finance Corporation against the Iowa-Wisconsin Bridge Company and specified or referred to in the Supplemental and Ancillary Bill of Complaint as amended of the Iowa-Wisconsin Bridge Company, were within the issues involved and were fully considered and determined by the Trial Court in its original Final Decree, which Decree was affirmed by the Circuit Court of Appeals of the Eighth Circuit, Cause No. 159, September Term, 1939, in the Superior Court of the State of Delaware in and for New Castle County, involving alleged toll tickets, and defenses thereto, are excepted herefrom.

Ten.

That John A. Thompson who was found by this Court in this cause as controlling the Phoenix Finance Corporation while dominating and controlling the bridge company in a fraudulent scheme, plan and conspiracy to cheat and defraud the bridge company and its stockholders, as president of the Phoenix Finance Corporation asserted about December 6, 1938, since the rendition of this Court's decisions and the decision of the Circuit Court of Appeals and the United States Supreme Court in this cause, that the litigation involved in this action was not ended and would not be ended for a good many years. That on the 8th day of July, 1939, as president of the Phoenix Finance Corporation, said

Thompson further asserted that one case had been tried in the Courts of Delaware in June, 1939; that the thing, referring to the matters involved in this case, was not over, and that there were six cases in the State of Delaware that would be carried on in the course of the next few months.

Eleven.

That said John A. Thompson on the 23rd day of November, 1938, wrote the stockholders of the Iowa-Wisconsin Bridge Company: "I am not asking you or any other man to help me or to help Phoenix; Phoenix does not need any help in its fight to maintain its creditor position. In the end the facts will all be proved in competent courts, I am not a bit disturbed about the final outcome," etc.

[fol. 151] That on the 12th day of June, 1939, the said John A. Thompson, president of the Phoenix Finance Corporation wrote to a stockholder and director of the Iowa-Wisconsin Bridge Company:

"Now Phoenix claimed outright ownership of $97,000 and $60,500 or a total of $157,000 of Bridge bonds. The $60,500 were bonds received in connection with the retirement of 517 shares of preferred stock which was unquestionably owned and paid for by Phoenix, so if the bonds were no good, certainly the Bridge Company must return the 517 shares of preferred stock to Phoenix. A suit is now pending in Delaware to enforce the Bridge Company to do that which it should in fairness and honesty do without a law suit, and there is not the slightest doubt that the Delaware Courts will make the Bridge Company make good on the $60,500 of bonds or return the 517 shares of preferred stock. So while this law suit may have resulted in the elimination of the $60,500 of bonds as a bonded debt, that was not a gain of $60,500 to the Bridge Company by any means.

"As to the $97,000 worth of bonds, even if the mortgage deed of trust had been adjudicated and eliminated, and it is still shown that the Bridge Company owes the $97,000 for legitimate borrowings, it makes little difference whether the Bridge Company pays the debt by reason of a mortgage foreclosure or by way of a judgment and execution against the Bridge.

"We have to this point accounted for $22,400 of bonds in the hands of third parties, eliminated by legitimate retirement of the full amount owing thereon, and $157,500 worth of bonds, the collection of which has been temporarily stayed, making a total of $179,000 and leaving $20,100 yet to be accounted for.

"These $20,100 of bonds were pledged as collateral against Bridge Company notes for borrowed money, totaling $17,735.19. Suits are now pending on these notes in the Delaware courts, and there is not the slightest chance that they will not be collected, because here Phoenix will have opportunity to present its evidence, which was never done in any of the proceedings in Federal Court, and could not properly be done because Phoenix and the Bridge Company, both being Delaware corporations, could not carry on as [fol. 152] proper parties with adverse interests in a Federal Court proceeding, as you well know."

That all of said matters were involved in this cause and determined by this court's decisions.

Twelve.

That on June 2, 1939, the said John A. Thompson and Phoenix Finance Corporation caused to be recorded in the office of the County Recorder in Book L pages 625-626 of Allamakee County, Iowa, an alleged mortgage of the Iowa-Wisconsin Bridge Company to the Phoenix Finance System, Inc., in the sum of $50,000 dated March 10, 1931, which this court in this cause found to be without consideration, fraudulent and void, issued as a part of a scheme, plan and conspiracy to cheat and defraud the bridge company and its stockholders. That by the recording of said alleged mortgage said Phoenix Finance Corporation has wrongfully cast a cloud upon the title of the defendant to its property and has attempted to render null and void that portion of the findings and decree and order of this Court finally determining the invalidity of said mortgage.

Thirteen.

That the complainant Phoenix Finance Corporation as hereinbefore set forth in threatening to and unless re-

strained by this Court will proceed to institute and prosecute actions as aforesaid and will permit to remain on record the invalid $50,000 mortgage aforesaid; that unless said complainant Phoenix Finance Corporation is restrained by this Court as herein prayed the defendant will be deprived of the fruits and advantages of the judgment, decree and orders of this Court in this cause and said complainant will continue with vexatious suits in utter disregard thereof; that the acts of said Phoenix Finance Corporation will cast a cloud over defendant's title and franchise because of a multiplicity of vexatious suits brought and to be brought against defendant and it will be damaged in a way that cannot be repaired or estimated at common law, and from these threatened wrongs the defendant has no remedy at common law but the only remedy is in equity.

[fol. 153] The foregoing Findings as requested by the Iowa-Wisconsin Bridge Company, are allowed and found with the Addendum to subdivision (e) of Finding Nine, added on the Court's motion; and subdivision (f) of Finding Nine, added on the Court's motion.

Dated this 7th day of October, 1939.

GEO. C. SCOTT,
United States District Judge.

Filed in the District Court October 7, 1939.

[fol. 154] Conclusions of Law.

Upon the facts found the Court concludes as matter of Law:

1. That all issues and ultimate facts litigated, or which under the issues joined opportunity was offered for litigation, upon the trial under the original bill of complaint as amended, were adjudicated on the entry of the final judgment and decree in the original case.

2. That all ultimate facts and issues involved and presented in each of the actions now pending in the State of Delaware and brought by the Phoenix Finance Corporation against the Iowa-Wisconsin Bridge Company, were within the issues and involved in considering the validity of the issue of bonds, the legality of which was in controversy on

the trial of the original case, and were adjudicated by the final decree entered in the original case. Cause No. 159, September Term, 1939, in the Superior Court of the State of Delaware in and for New Castle County, involving alleged toll tickets and defenses thereto, are excepted herefrom.

3. That upon the showing and proofs contained in the Iowa-Wisconsin Bridge Company's supplemental verified bill of complaint and supporting papers verified and submitted therewith, and upon the hearing the Iowa-Wisconsin Bridge Company is entitled to a preliminary injunction restraining the Phoenix Finance Corporation, its officers, agents, servants, employees and attorneys, and all those persons in active concert or participation with them who receive actual notice of the Order by personal service or otherwise, from instituting, prosecuting or continuing the prosecution of any and all actions in any court in the State of Delaware or elsewhere drawing in question any of the facts or issues presented in any of the cases now pending [fol. 155] in the State of Delaware, or drawing in question any of the ultimate facts and issues adjudicated by the final decree entered on the trial of the original case. Cause No. 159, September Term, 1939, in the Superior Court of the State of Delaware in and for New Castle County, involving alleged toll tickets and defenses thereto, are excepted herefrom.

4. That the hearing had on the 28th day of September, 1939, at the United States Court Room in Cedar Rapids, Iowa, in the Cedar Rapids Division of this District, upon the Iowa-Wisconsin Bridge Company's application for preliminary injunction, was had upon adequate and reasonable notice prescribed by this Court and given the Phoenix Finance Corporation by personal service on its authorized agent within this District, on the 18th day of this present month of September, 1939.

The foregoing Conclusions of Law are found by the Court this 7th day of October, 1939.

GEO. C. SCOTT,
United States District Judge.

Filed in the District Court October 7, 1939.

[fol. 156] (Order Granting Preliminary Injunction, etc., October 7, 1939.)

In the District Court of the United States for the Northern District of Iowa, Eastern Division.

First Trust & Savings Bank, (formerly Bechtel Trust Company) and A. H. Schubert, as Trustees and Phoenix Finance Corporation, Complainants,

No. 220. vs. Equity.

Iowa-Wisconsin Bridge Company, a corporation, Defendant,

Fayette D. Kendrick, Warren G. Hayes, Anna W. Schuster, T. H. Bakewell and Ernest W. Haveland, Interveners.

This cause came on to be heard the 28th day of September, 1939, at a regular term of this Court at Cedar Rapids, Iowa, on the motion of Iowa-Wisconsin Bridge Company, defendant, in said action, for a preliminary injunction, pursuant to notice duly given as required by law and by the order of this Court.

Said motion was heard upon defendant's verified Supplemental and Ancillary Bill of Complaint and the exhibits attached thereto, the joint affidavit of Fred A. Ontjes and Wm. C. Green, verified September 28, 1939, the amendments to the Supplemental and Ancillary Bill of Complaint and all the records and files in the above entitled action, on the part of defendant, and upon resistance on the part of the complainant, Phoenix Finance Corporation.

After hearing counsel for the respective parties, and due consideration of the matter, and the Court having made its Findings of Fact and Conclusions of Law, it appearing to the Court that the issuance of a preliminary injunction is necessary to prevent immediate and irreparable damage, for the reasons following:

[fol. 157] That the above entitled cause was commenced by the trustee complainants at the request and instigation of the complainant Phoenix Finance Corporation against the defendant; that thereafter Phoenix Finance Corporation was made a party complainant by order of the Court and said action was prosecuted under the direction of said

complainant Phoenix Finance Corporation; that on the first day of December, 1936, this court filed its opinion and findings of fact and final decree by which all matters and differences between said complainant Phoenix Finance Corporation and its predecessor Phoenix Finance System, Inc., on the one hand and the defendant Iowa-Wisconsin Bridge Company on the other were fully settled, adjudicated and determined. That following the entry of the decree aforesaid said Phoenix Finance Corporation filed a petition for rehearing with a prayer in the alternative that the decree be modified so as to withhold from adjudication the question of the validity of the $50,000.00 mortgage dated March 10, 1931, by permitting Phoenix Finance Corporation to institute an action at law against the bridge company if it so desired, for money had and received and that there be reinvested in said Phoenix Finance Corporation 517 shares of Class A stock surrendered in exchange for bonds, which petition for rehearing and petition for modification of decree were denied, this court having found that the stock in question was cancelled when the bonds in question were fraudulently obtained by Phoenix Finance Corporation and having denied the petition for rehearing and motion for modification of the decree and refused to order the reissuance of the stock to Phoenix Finance Corporation.

That thereafter an appeal from said decree, orders, rulings and adjudication was taken to the Circuit Court of Appeals of the Eighth Circuit by the complainants, including Phoenix Finance Corporation, where the same was affirmed. That thereafter a petition for writ of certiorari to the Supreme Court of the United States by said complainants was denied and the mandate of the Circuit Court of Appeals issued on the third day of April, 1939, and on the [fol. 158] 6th day of April, 1939, filed and entered in the office of the Clerk of this Court.

That the above entitled action was commenced about the 28th day of August, 1933. That a large number of depositions were taken which involved a great deal of time; that there were very voluminous transcripts and [hundred] of exhibits; that the trial on which a large amount of additional oral testimony was taken involved a number of

weeks; that the hearing before this court on exceptions involved months of work; and that this cause was defended against the unjust claims of Phoenix Finance Corporation at great expense to the defendant bridge company and that since in the said action the various claims of Phoenix Finance Corporation were fully heard and adjudicated to relitigate the matters determined, piece-meal or otherwise, would subject the bridge company to great expense, and impair its credit and business to its irreparable injury. That notwithstanding the final adjudication and order of this court, the complainant Phoenix Finance Corporation, disregarding said adjudication and order and for the purpose of attempting to invalidate and nullify the lawful decree and order of this court, and for the purpose of depriving the defendant Iowa-Wisconsin Bridge Company of the fruits of said adjudication and for the purpose of harassing, vexing and annoying and destroying the business of said defendant, has commenced and is prosecuting and is about to prosecute in the courts of the State of Delaware numerous suits and actions involving the same matters fully and finally determined by this court and especially that it has commenced and is prosecuting the following actions:

(a) One to recover on two certain alleged promissory notes, one of $2,000.00. dated December 15, 1932 and one of $3,125. dated January 20, 1933, which were involved in this cause, and the adjudication thereof, it having been claimed that said notes and the alleged considerations thereof formed part of the consideration for the issuance of $20,100. of bonds involved in this action, which bonds this court found were fraudulently issued and wholly without [fol. 159] consideration and more than offset by indebtedness of Phoenix Finance Corporation and its predecessor Phoenix Finance System, Inc. to the defendant, Iowa-Wisconsin Bridge Company.

(b) One to recover 517 shares of Class A stock of the Iowa-Wisconsin Bridge Company surrendered and cancelled at the time Phoenix Finance Corporation fraudulently procured the issuance of $60,500. of bonds involved in this action, which stock this court and the Circuit Court of Appeals ordered, adjudged and found said Phoenix Finance Corporation was not entitled to have reissued to it.

(c) One to recover upon an alleged promissory note of $500. dated December 31, 1932, and an alleged promissory note for $12,110.19, dated July 7, 1933, said claims being repeated as an alleged claim for $15,000. for money claimed to have been lent and advanced and an alleged claim for $7,000. claimed for interest; both of said alleged promissory notes having been involved in the above entitled cause and adjudication thereof, and this court having found that said notes and the alleged considerations therefor formed part of the consideration for the issuance of $20,100. of bonds involved in this action, and that said bonds were fraudulently issued and wholly without consideration and more than offset by indebtedness of Phoenix Finance Corporation and its predecessor Phoenix Finance System, Inc. to this defendant Iowa-Wisconsin Bridge Company.

(d) One on an alleged guaranty agreement claimed to have been entered into between Phoenix Finance System, Inc., J. W. Shaffer and Company and Iowa-Wisconsin Bridge Company dated November 10, 1930, under and by virtue of which said Phoenix Finance Corporation claims defendant became indebted to Phoenix Finance System, Inc. in the sum of $21,262.71, which said agreement was fully adjudicated and passed upon by this court and found to be without consideration, fraudulent, void and ultra vires.

(e) One to recover upon one Series B Bond No. 93 in the face amount of $500. and one Series B Bond No. 97 in the face amount of $500., which were part of the bonds directly involved in this action, being a part of a certain [fol. 160] group of bonds issued to one Helmer Anderson in the total amount of $7,400., which this Court found to be valid to the extent of $6,000. only, this Court having directed that said sum of $6,000. be paid from income of the Bridge Company. That sixty/seventy-fourths (60/74) of the face value of said bonds with accrued interest to May 1, 1939, has been available since May 1, 1939, and will be paid to the lawful holder of said bonds by the Receiver of this Court on surrender of said bonds.

(f) That all ultimate facts and issues involved and presented in each of the actions now pending in the Court of the State of Delaware and brought by the Phoenix Finance

Corporation against the Iowa-Wisconsin Bridge Company and specified or referred to in the Supplemental and Ancillary Bill of Complaint as amended of the Iowa-Wisconsin Bridge Company, were within the issues and involved and were fully considered and determined by the Trial Court in its original Final Decree, which Decree was affirmed by the Circuit Court of Appeals of the Eighth Circuit. Cause No. 159, September Term, 1939, in the Superior Court of the State of Delaware in and for New Castle County involving alleged toll tickets and defenses thereto, are excepted herefrom.

That on June 2, 1939, John A. Thompson and Phoenix Finance Corporation caused to be recorded in the office of the County Recorder of Allamakee County in Book L, pages 625-626, an alleged mortgage of the Iowa-Wisconsin Bridge Company to Phoenix Finance System, Inc., in the sum of $50,000. dated March 10, 1931, which this court in this cause found to be without consideration, fraudulent and void, issued as a part of a scheme, plan and conspiracy to cheat and defraud the bridge company and its stockholders and by the recording of said alleged mortgage said Phoenix Finance Corporation has wrongfully cast a cloud upon the title of this defendant to its property and has attempted to render null and void that portion of the decree and order of this court finally determining the invalidity of said mortgage.

[fol. 161] That the complainant Phoenix Finance Corporation is threatening to and unless restrained by this court will proceed to institute and prosecute actions as aforesaid and will permit to remain upon the record the invalid $50,000. mortgage aforesaid, and that unless said complainant Phoenix Finance Corporation is restrained by this court the defendant Iowa-Wisconsin Bridge Company will be deprived of the fruits and advantages of the judgment, decree and orders of this court in this cause, and said complainant Phoenix Finance Corporation will continue with vexatious suits in utter disregard thereof and that the acts of said Phoenix Finance Corporation will cast a cloud over defendant's franchises because of a multiplicity of vexatious suits brought and to be brought against defendant, and it will be damaged in a way that cannot be repaired or estimated at common law, and from these threatened

wrongs said defendant Iowa-Wisconsin Bridge Company has no remedy at common law, but the only remedy is in equity,

Now, Therefore, It Is Ordered, Adjudged And Decreed that a preliminary injunction be and it hereby is granted defendant Iowa-Wisconsin Bridge Company against the complainant Phoenix Finance Corporation, and its officers, agents, servants, employees and attorneys, and all those acting by or through or for it or them, and its successors and assignees, and enjoining and restraining it and them, jointly and severally, until the further order of this court from in any wise further proceeding, conducting or carrying forward in any manner whatsoever, or causing, procuring or suffering to be conducted or carried forward, in any manner whatsoever, any and all steps, motions or proceedings in the following actions or suits heretofore brought, instituted and commenced by said Phoenix Finance Corporation, complainant herein, against the above named Iowa-Wisconsin Bridge Company, defendant herein, in the courts of the State of Delaware, to-wit:

[fol. 162] (a) The action commenced in the Superior Court of the State of Delaware in and for New Castle County entitled Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware versus Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware, the summons in said action being dated September 29, 1938, and the cause being Number 39, November Term, 1938.

(b) The action commenced in the court of Chancery of the State of Delaware in and for New Castle County entitled Phoenix Finance Corporation, a corporation of the State of Delaware, Plaintiff versus Iowa-Wisconsin Bridge Company, a corporation of the State of Delaware, defendant, the bill of complaint having been filed February 18, 1939.

(c) The action commenced in the Superior Court of the State of Delaware in and for New Castle County entitled Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware

versus Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware, the summons in which was issued on the 22nd day of June, 1939, being cause number 65, September Term, 1939.

(d) The action commenced in the Superior Court of the State of Delaware in and for New Castle County entitled Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware versus Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware, summons in which was issued on June 22, 1939, being case number 64, September Term, 1939.

(e) The action commenced in the Superior Court of the State of Delaware in and for New Castle County entitled Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware versus Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of [fol. 163] Delaware, in which summons was issued on the 11th day of July, 1939, being case No. 79, September Term, 1939.

It is further Ordered, Adjudged And Decreed that the said Phoenix Finance Corporation, its officers, agents, servants, employees and attorneys, and all those acting by or through or for it or them and its successors and assignees, be, and it and they are jointly and severally enjoined and restrained until the further order of this court from instituting, bringing, commencing or continuing any and all further actions or suits founded or based upon claims of said Phoenix Finance Corporation against said defendant Iowa-Wisconsin Bridge Company, concerning which findings were made by this court in this action or which were determined by this court in its order denying petition for rehearing and motion for a modification of decree by said Phoenix Finance Corporation, or which were determined by the Circuit Court of Appeals of the United States for the Eighth Circuit upon the appeal of said Phoenix Finance Corporation, and particularly those matters and

things which are set forth and referred to in the Supplemental and Ancillary Bill heretofore filed in this [cuit].

It is further Ordered, Adjudged and Decreed that said Phoenix Finance Corporation, its officers, agents, servants, employees and attorneys, and all those acting by or through or for it or them and its successors and assignees be and they are jointly and severally commanded and ordered forthwith to satisfy, release, discharge and remove from the records of the Recorder's office in Allamakee County, Iowa, that certain mortgage executed by Iowa-Wisconsin Bridge Company to Phoenix Finance System, Inc., dated March 10, 1931, recorded in the office of said County Recorder of said Allamakee County, Iowa, on the second day of June, 1939, in Book L, at pages 625-626, covering property and assets of said Iowa-Wisconsin Bridge Company and that they deliver the original of said mortgage to this court to be by it held until the final determination upon the Supplemental and Ancillary Bill filed by the defendant herein.

[fol. 164] It is further Ordered that defendant Iowa-Wisconsin Bridge Company forthwith give a bond in the sum of $2,000. conditioned in conformity with the Rules of Civil Procedure, but without surety and that in lieu of a surety, $2,000.00 of the funds in the possession of the Receiver be by the Receiver paid to the Clerk of this Court and by the Clerk carried into the Registry of the Court to secure said bond. And that this preliminary injunction remain in full force and effect until final hearing of this cause and until further order of this Court.

It appearing to the Court that the complainant Phoenix Finance Corporation is a corporation organized and existing under the laws of the State of Delaware, that it is permitted to do business in the State of Iowa and that Casper Schenk, Esq., is its resident agent in Iowa, it is Ordered that this injunction be served on the complainant by service of the same upon the said Casper Schenk as resident agent and that it be served upon Casper Schenk as Attorney for the Company.

It is further Ordered that copies of this Order, duly attested by the Clerk of this Court under the seal of the

Court, be served in lieu of the ordinary writ of preliminary injunction with the same force and effect.

Dated this 7th day of October, 1939.

GEO. C. SCOTT,
United States District Judge.

Filed in the District Court October 7, 1939.

[fol. 165] (Order directing Receiver to deposit with Clerk certain Money to secure Condition of Preliminary Injunction Bond.)

An Order for Preliminary Injunction on Supplemental Complaint having this day been ordered upon conditions,

It is now further Ordered that the Receiver deposit out of funds in his hands with the Clerk of this Court $2,000.00, to be deposited in the Registry to secure the condition of the preliminary injunction bond.

Done and Ordered this 7th day of October, 1939.

GEO. C. SCOTT,
United States District Judge.

Filed in the District Court October 7, 1939.

[fol. 166] (Preliminary Injunction Bond.)

Know All Men By These Presents:

That the undersigned, Iowa-Wisconsin Bridge Company, a corporation organized under the laws of Delaware, defendant in the above entitled action, as principal, is held and firmly bound unto the Phoenix Finance Corporation complainant named in the above entitled action and its successors and assigns in the sum of $2000.00, lawful money of the United States, to be paid to the said complainant, its successors or assigns, for which payment well and truly to be made, the said Iowa-Wisconsin Bridge Company binds itself firmly by these presents.

Sealed with its (Iowa-Wisconsin Bridge Company) seal and dated this ninth day of October 1939.

The condition of the above obligation is such that whereas the said Iowa-Wisconsin Bridge Company, defendant in the above entitled cause, has obtained from the District Court of the United States for the Northern District of Iowa, Eastern Division a preliminary injunction enjoining and commanding the said Phoenix Finance Corporation, its officers, agents, servants, employees and attorneys as prayed for in Supplemental and Ancillary Bill of Complaint and as stated in said Order and Injunction in the above entitled cause, upon the condition that the said defendant, Iowa-Wisconsin Bridge Company, shall execute and file a bond in the sum of Two Thousand ($2000.00) Dollars conditioned in conformity with the rules of Civil Procedure, but without surety, and that in lieu of surety, Two Thousand ($2000.00) Dollars of the funds in the possession of the Receiver, be paid by the Receiver to the Clerk of this Court, and by the Clerk carried into the registry of the Court to secure said bond.

Now, if the above bounden defendant, Iowa-Wisconsin Bridge Company, shall well and truly pay all costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined, restrained or commanded by reason of said preliminary restraining and commanding order of injunction, should it hereafter [fol. 167] be dissolved or it be decided that said preliminary injunction was wrongfully obtained, then this obligation to be void, otherwise to remain in full force and virtue.

IOWA-WISCONSIN BRIDGE COMPANY,
By H. A. Schremser,
President.

Attested:

Irene M. Bell,
Secretary.

Filed in the District Court October 10, 1939.

(Note by Clerk of the District Court—On October 10, 1939, there was paid into the Registry of the Court by the Receiver of Iowa-Wisconsin Bridge Company the sum of $2000.00 as security for bond on preliminary injunction.)

[fol. 168] (Motion of Phoenix Finance Corporation for Appointment of Auditor.)

Now comes Phoenix Finance Corporation and moves that the Court appoint as an auditor herein a certified public accountant or a firm of certified public accountants to be designated by the Court, to examine the accounts between Phoenix Finance Corporation, Phoenix Finance System, Inc., and Thompson & Company, hereinafter called the Phoenix Group, on the one hand, and Iowa-Wisconsin Bridge Company on the other hand, as shown by their respective bank accounts, bank statements, cancelled checks, books of account, vouchers, and other records, and to set forth the results of such examination so as to show in detail the cash receipts of the Bridge Company from, and its disbursements to, the Phoenix Group from November 1, 1930 to September 25, 1933, and such further matters with respect to the financial transactions of the Bridge Company as the Court may order.

In support of this motion Phoenix Finance Corporation submits herewith a verified statement prepared by a certified public accountant, based upon an examination of the [fol. 169] documents above enumerated, from which it appears that as at September 25, 1933 the cash receipts of the Bridge Company from the Phoenix Group exceeded its cash disbursements to the Phoenix Group by $104,740.48.

And Phoenix Finance Corporation hereby agrees to make available to such auditor, at such time and place as such auditor may specify, the books of account, bank statements, cancelled checks, vouchers, and all other records of the Phoenix Group pertaining to transactions with Iowa-Wisconsin Bridge Company, and to authorize such auditor to examine the bank accounts of the Phoenix Group as shown by the books and records of the banks in which it has deposited its funds: and moves that the Court order Iowa-Wisconsin Bridge Company to make its books of account, bank statements, cancelled checks, vouchers, and other records and its bank accounts available to such auditor in like manner.

And Phoenix Finance Corporation hereby offers to deposit with the Clerk of this Court such amount, not exceeding $2,000. as may be required to pay the compensa-

tion and expenses of such auditor, and agrees to leave to the discretion of the Court the question of the taxation of the amount so paid as costs in this suit.

HAROLD W. NORMAN,
Attorneys for Appellant,
Phoenix Finance Corporation.

CASPER SCHENK,
917 Des Moines Building,
Des Moines, Iowa.

JAMES R. MORFORD,
829 Delaware Trust Building,
Wilmington, Del.

HAROLD W. NORMAN and
EDWARD A. ZIMMERMAN,
ZIMMERMAN & NORMAN,
111 West Monroe Street,
Chicago, Illinois.

Filed in the District Court, November 2, 1939.

[fol. 170] I have examined the records pertaining to cash receipts and disbursements of the Iowa-Wisconsin Bridge Company for the period dating from the time the original books of account were set up, November 1, 1930, to and including September 25, 1933, the latter date being the last business day prior to the appointment of a Receiver.

In checking the records of the cash receipts and disbursements of the Iowa-Wisconsin Bridge Company I found that it had received $454,964.14 and had disbursed $454,290.65, leaving a cash balance of $673.49 at September 25, 1933.

I have classified all items, both receipts and disbursements, separating those coming from or going to the Phoenix Finance Corporation, Phoenix Finance System, Inc. and Thompson & Company (hereinafter referred to as the Phoenix group).

Included in the aforementioned cash receipts was the amount of $318,141.85 as coming from the Phoenix group, and included in the aforementioned disbursements was the sum of $213,401.37 disbursed to the Phoenix group, leav-

ing a net excess cash received from the Phoenix group in the sum of $104,740.48.

GEORGE E. PREUSS.

State of Illinois,
County of Cook—ss.:

George E. Preuss, being first duly sworn, deposes and says that he is of lawful age; that he is a certified public accountant licensed under the laws of Illinois and having his residence in Chicago, Illinois; that the foregoing statement was prepared under his direction and supervision; that he is familiar with the contents thereof, and that the same is true and correct to the best of his knowledge and belief.

GEORGE E. PREUSS.

Subscribed and sworn to before me, a notary public in and for said County and State, this first day of November, 1939.

(Seal) MABEL YOUNG,
Notary Public.

My Commission expires—July 12, 1942.

Filed in the District Court, November 2, 1939.

[fol. 171] (Notice of Hearing for Appointment of Auditor.)

To F. A. Ontjes and W. C. Green, Attorneys for Iowa-Wisconsin Bridge Company:

You and each of you are hereby notified that Phoenix Finance Corporation will file its "Motion for Appointment of an Auditor" in the above entitled cause, a copy of which is hereto attached and made a part hereof, and that said Motion will come on for hearing and submission at Dubuque, Iowa, in the United States District Court Room, on November 7, 1939 or as soon thereafter as the same can be heard by the Court.

CASPER SCHENK,
JAMES R. MORFORD,
HAROLD W. NORMAN,
(HAROLD W. NORMAN and
EDWARD A. ZIMMERMAN,
ZIMMERMAN and NORMAN),
Attorneys for Phoenix Finance Corporation.

We hereby accept service of the foregoing Notice and acknowledge receipt of a copy of the foregoing Notice and of the Motion for Appointment of an Auditor thereto attached, this ..... day of November, 1939.

Attorneys for Iowa-Wisconsin Bridge Company.

Filed in the District Court, November 2, 1940.

[fol. 172] (Order Modifying Order Granting Preliminary Injunction, November 6, 1939.)

Now on this 6th day of November, 1939, and the Court being held in the United States Court Room in Dubuque, Iowa, it coming to the attention of the Court that counsel for the Iowa-Wisconsin Bridge Company in preparing the Order signed and entered on October 7th, 1939, inadvertently included in the draft of said Order a mandatory provision relative to the $50,000.00 mortgage referred to in the Supplemental and Ancillary Complaint, and the Court at the time of signing said Order having inadvertently overlooked such provision,

It Is Now On This Day Ordered and Decreed that the Order of October 7th, 1939, be and the same is hereby modified by deleting and eliminating the provisions of said Order and Interlocutory Decree commanding the release and Delivery of said mortgage and note secured thereby, reading as follows:

"It is further Ordered, Adjudged And Decreed that said Phoenix Finance Corporation, its officers, agents, servants, employees and attorneys, and all those acting by or through or for it or them and its successors and assignees be and [fol. 173] they are jointly and severally commanded and ordered forthwith to satisfy, release, discharge and remove from the records of the Recorder's office in Allamakee County, Iowa, that certain mortgage executed by Iowa-Wisconsin Bridge Company to Phoenix Finance System, Inc., dated March 10, 1931, recorded in the office of said County Recorder of said Allamakee County, Iowa, on the second day of June, 1939, in Book L, at pages 625-626, covering

property and assets of said Iowa-Wisconsin Bridge Company and that they deliver the original of said mortgage to this court to be by it held until the final determination upon the Supplemental and Ancillary Bill filed by the defendant herein."

but nevertheless the Respondent Phoenix Finance Corporation and all persons representing or acting for it be and are hereby enjoined from either disposing of said mortgage or in any way attempting to enforce the same, pending the further Order of this Court.

Done and Ordered this 6th day of November, 1939.

GEO. C. SCOTT,
United States District Judge.

Filed in the District Court, November 6, 1939.

[fol. 174] (Order Overruling Motion for Appointment of Auditor.)

On this 7th day of November, 1939, it being the regular November Motion Day of this Court, the Motion of the Phoenix Finance Corporation. Respondent, to the Iowa-Wisconsin Bridge Company's Supplemental Bill of Complaint as amended for Appointment of an Auditor coming on to be heard and considered, and the same having been submitted under local Rule 3, and the Court having considered the same,

It Is Ordered that said Motion be and it is hereby overruled, and the appointment of an auditor denied.

Done and Ordered this 7th day of November, 1939.

GEO. C. SCOTT,
United States District Judge.

Filed in the District Court, November 7, 1939.

[fol. 175] (Answer and Counterclaim of Phoenix Finance Corporation.)

Phoenix Finance Corporation, a corporation organized and existing under the laws of the State of Delaware, hereinafter referred to as "Phoenix," defendant to the Sup-

plemental and Ancillary Bill as amended herein of the Iowa-Wisconsin Bridge Company, hereinafter referred to as "Bridge Company," answering the said bill, states as follows:

First Defense.

1. Denies each and every allegation of paragraph 1 except that it admits that the above entitled cause was commenced by the said Trustees on a certain deed of trust and bonds at the formal request of Phoenix; that a receiver was appointed of all the property of the Bridge Company and that thereafter petitions of intervention were filed by the above named interveners with leave of Court, and that Phoenix was by order of Court made a party complainant, but alleges that by said order it was made a nominal complainant only, and alleges that this Court held:

[fol. 176] "I am of opinion that the trustees were the only indispensable parties plaintiff, had exclusive control of the litigation, and that the only effect of bringing in the Phoenix Finance Corporation was by admissions in testimony to establish the status of that corporation as the holder and owner of about ninety per cent of the bond issue.",

and alleges that the said receivership was solely that incident to the foreclosure and not a general receivership.

2. Admits the first sentence of paragraph 2 and denies each and every allegation of the second sentence of paragraph 2.

3. Denies each and every allegation of paragraph 3, except that it admits that after the entry of the decree aforesaid, it filed a petition for rehearing, with an alternative prayer, but alleges that said alternative prayer was in words and figures as follows:

"Second. In case rehearing is denied, then as alternative relief that the decree be modified so as to withhold from adjudication the question of the validity of the $50,000. mortgage given by the Bridge Company to petitioner, reserving the right to petitioner to litigate said mortgage in another action, if it so desires.

"Third. In case rehearing is denied, the decree be so modified as to revest in petitioner 517 shares of 'A' stock surrendered in exchange for bonds.

"Fourth. In case rehearing is denied, that the decree be modified so as to withhold from adjudication the right of petitioner to institute an action at law against the Bridge Company, if it so desires, for money had and received."

and that it admits that the petition for rehearing and the alternative prayers were all denied by the order set forth in Exhibit D, and alleges that neither the decree nor the said order was any adjudication against Phoenix of the matters set forth in the alternative prayer.

4. Admits the allegations contained in paragraph 4.

5. Answering paragraph 5, admits all allegations concerning date of commencement, depositions, transcripts, exhibits, and trial before Master, except the length there- [fol. 177] of, which appear in paragraph 5 prior to the allegation concerning work on exceptions, settling record, and appeal, and as to this allegation Phoenix states it is without knowledge or information sufficient to form a belief as to the truth thereof. Further answering, denies each and every allegation of paragraph 5 not herein expressly admitted.

6. Denies each and every allegation of paragraph 6, except that it admits that it has commenced and is prosecuting, and is about to prosecute, in the State of Delaware, the suit and actions hereinafter specifically described, save as restrained by the Preliminary Injunction issued by this Court, and admits that it has filed for record and recorded a $50,000. mortgage from the Bridge Company to Phoenix Finance System, Inc.

7. Answering paragraph 7, admits that it has commenced and was prosecuting the following suits against the Bridge Company until the entry of the Preliminary Injunction herein by this Court:

(a) Admits that it filed the action described in paragraph 7(a), based on two promissory notes, one of $2000. and one of $3,125; admits that this Court set forth in its decree that the mortgage and bonds sought to be foreclosed were fraudulently issued and that the bonds were without valid consideration, with the exception of certain bonds aggregating $15,000.; admits that in the said Delaware action the Bridge Company pleaded res judicata and other

defenses such as want of consideration, and that the said cause was tried on the issue of res judicata but has not yet been determined by the Delaware Court, and alleges that all other defenses except res judicata were withdrawn by the Bridge Company prior to the submission of said cause. Further answering paragraph 7(a), Phoenix denies each [fol. 178] and every allegation thereof not herein expressly admitted.

(b) Admits that it commenced the action described in paragraph 7(b), seeking the delivery to Phoenix of a new certificate for 517 shares of Class A stock; admits that the certificate for these shares was delivered by Phoenix to the Bridge Company in connection with the issue of $60,500. of bonds of the Bridge Company; admits that the Bridge Company answered in said cause in Delaware, and alleges that the Bridge Company has pleaded the defense of res judicata therein, and admits that the said cause has not been tried. Further answering, Phoenix denies each and every allegation of paragraph 7(b) not herein expressly admitted.

(c) Answering paragraph 7(c), admits the allegations thereof as contained in the original Supplemental and Ancillary Bill before amendment. As to the matters added by said amendment, Phoenix admits that said cause of action in Delaware is based upon promissory notes of $500. and of $12,110.19, dated as set forth in the amendment, and that said Delaware cause claimed $7,000. as interest to July 1, 1939, and admits that the common counts in the sum of $15,000. were also pleaded in said action. Admits that this Court in its decree set forth that the mortgage and bonds sought to be foreclosed were fraudulently issued and that all bonds, with the exception of certain bonds aggregating $15,000., were without valid consideration. Further answering paragraph 7(c), Phoenix denies each and every allegation thereof not expressly herein admitted.

(d) Answering paragraph 7(d), Phoenix admits the allegations thereof contained in the Supplemental and An- [fol. 179] cillary Bill before amendment, and admits the allegations contained in the first sentence of the paragraph added to paragraph 7(d) by amendment; admits that the agreement sued upon in said Delaware action is referred to

in Finding No. 24 of this Court. Further answering, Phoenix denies each and every allegation of paragraph 7(d) not herein expressly admitted.

(e) Answering paragraph 7(e), Phoenix admits the allegations thereof contained in the original Supplemental and Ancillary Bill before amendment; further answering Phoenix admits that its cause of action in Delaware was based upon two Series B bonds of the Bridge Company, numbered 93 and 97, in the face amount of $500 each; admits that bonds in the total amount of $7,400. originally issued to Helmer Anderson were allowed by this Court to the extent of $6,000. and were directed to be paid from the income of the Bridge Company, and admits that said bonds numbered 93 and 97 constitute part of the bonds originally issued to Helmer Anderson by the Bridge Company. Further answering, Phoenix denies each and every allegation of paragraph 7(e) not herein expressly admitted.

[fol. 180] (f) Answering paragraph 7(f), Phoenix admits the allegations thereof contained in the original Supplemental and Ancillary Bill before amendment, and also admits the allegations contained in the first sentence of the matter added to paragraph 7(f) by the amendment, except that Phoenix denies that the claim in the said Delaware action is based on the purchase by Phoenix from the Bridge Company of the said toll bridge tickets, but states that said claim is based upon the purchase of the said toll bridge tickets by Thompson & Company for $5,000. in cash from the Bridge Company, and that Phoenix subsequently purchased said toll tickets and paid a valuable consideration therefor; Phoenix denies each and every allegation of paragraph 7(f) not herein expressly admitted.

8. Denies each and every allegation of paragraph 8.

9. Denies each and every allegation of paragraph 9, except that it admits that on July 8, 1939, John A. Thompson did say that there were six cases pending in the State of Delaware that would be carried on in the course of the next few months.

10. Denies each and every allegation of paragraph 10, except that it admits that John A. Thompson on November 23, 1938 wrote a letter to the stockholders of the Bridge

Company, containing the substance of but not precisely the matter as it is purported to be quoted in the Supplemental and Ancillary Bill herein, and admits that on June 12, 1939 John A. Thompson wrote to a stockholder and director of the Bridge Company substantially, but not precisely, as quoted in paragraph 10 of the Supplemental and Ancillary Bill herein, and Phoenix offers to present true and correct copies of said letters at the trial hereof.

11. Denies each and every allegation of paragraph 11, except that it admits that on June 2, 1939 it caused to be [fol. 181] recorded in the office of the County Recorder, in Book L, pages 625-626 of the records of Allamakee County, Iowa, a certain mortgage executed by the Bridge Company to Phoenix Finance System, Inc., in the sum of $50,000., dated March 10, 1931, and admits that this Court in its findings made reference to this mortgage, substantially as set forth in paragraph 11 of the Supplemental and Ancillary Bill herein.

12. Denies each and every allegation of paragraph 12, except that it admits that it intends to prosecute the actions hereinbefore described in paragraph 7 and proposes to permit to remain on record the $50,000. mortgage above described, to the extent that it is not restrained by the preliminary injunction of this Court.

Second Defense.

13. The bonds sued upon in the action described in paragraph 7(e) hereof were acquired by Phoenix as a holder in due course for value. On November 26, 1930 the Bridge Company sold a certain leasehold on property owned by it, for $6,000., which leasehold was purchased by one Anderson from the owner thereof; subsequently, improvements consisting of valuable oil station equipment were placed thereon at the expense of said Anderson, and thereafter the Bridge Company purchased the said leasehold, together with the improvements which had been placed thereon, on March 7, 1931, for the aforesaid $7,400. of bonds; prior to the filing of the foreclosure proceedings entitled as above, said Anderson sold all of the said bonds for valuable considerations to various persons, and thereafter, prior to the decree entered in the above entitled

cause, Phoenix purchased the said two bonds described in said paragraph 7(e) for a valuable consideration from holders in due course. No issue with respect to the right of Phoenix to recover on said bonds was or could have been adjudicated by the said decree of December 1, 1936.

[fol. 182] Third Defense.

14. The Bridge Company has appeared generally in the courts of Delaware and submitted to their jurisdiction in each of the actions and the suit described in paragraph 7 of the Supplemental and Ancillary Bill herein and more fully shown by the copies of the statements of claim in such actions and suit attached to the Resistance of Motion for Preliminary Injunction heretofore filed by Phoenix in this Court, to which reference is hereby made for a complete statement thereof. The Bridge Company has pleaded the defense of res judicata in the action described in sub-paragraph (a) and the suit described in sub-paragraph (b) of said paragraph 7 and has the right to plead said defense in the remaining actions in Delaware. Said issue can be heard and determined in the Delaware courts, of which state both Phoenix and the Bridge Company are citizens and residents, and there is no occasion for the exercise of extraordinary relief by this Court as prayed in the Supplemental and Ancillary Bill. As to the cause of action set forth in said sub-paragraph (b), it relates to the management of the internal affairs of the Bridge Company, a Delaware corporation, and as such is exclusively within the purview of the chancery courts of the State of Delaware.

Fourth Defense.

15. The opinion, decree and findings of December 1, 1936 attached as exhibits to the Supplemental and Ancillary Bill herein were made and entered in a suit for foreclosure of a trust deed in which the only issue before this Court was the right of the plaintiff Trustees to a decree of foreclosure, and Phoenix hereby makes a part of this answer by reference the pleadings filed in said cause, to-wit: Bill of Complaint filed August 28, 1933, Answer thereto filed September 25, 1933, Amendment to said Answer filed December 8, 1933. Petition of Intervention filed December 5, 1933, Amendment to said Petition filed September 17,

1934, Complainant's Reply to Petition of Intervention filed [fol. 183] November 6, 1934, Answer of Phoenix to Petition of Intervention filed February 23, 1934, and Petition of Intervention filed May 6, 1935, and the Supplemental opinion and order of this Court entered January 5, 1937. No issue was presented to this Court with respect to the accounts between Phoenix or its predecessors in interest and the Bridge Company or as to any of the matters involved in the said litigation brought by Phoenix against the Bridge Company in the courts of Delaware, or as to the validity of the $50,000. note and mortgage described in said Supplemental and Ancillary Bill.

Fifth Defense.

16. Phoenix, since the date of its incorporation, and Phoenix Finance System, Inc., and the Bridge Company since the commencement of said foreclosure proceedings, were and have continued to be to the date hereof corporations organized and existing under the laws of the State of Delaware and citizens thereof, and this Court has never had and does not now have any jurisdiction of any controversies between Phoenix or Phoenix Finance System, Inc., and the Bridge Company or as to any of the matters involved in the said litigation brought by Phoenix against the Bridge Company in the courts of Delaware, or as to the validity of the $50,000. note and mortgage described in said Supplemental and Ancillary Bill.

Sixth Defense and Counterclaim.

Without waiving the defenses heretofore urged, Phoenix shows that the Bridge Company should not have the relief now prayed without first restoring to Phoenix that which the Bridge Company has received from Phoenix and its predecessors in interest in the transactions described in said Supplemental and Ancillary Bill, and alleges:

17. The Bridge Company was incorporated for the specific purpose of constructing a bridge across the Mississippi River near Lansing, Iowa, and the approaches and [fol. 184] appurtenances therefor (hereinafter referred to collectively as the Bridge Project). Prior to November 1, 1930, it had entered into valid, subsisting contracts for the engineering, grading and the construction of the substruc-

ture of the Bridge Project and these contracts by assignment had become contracts between the Bridge Company and John W. Shaffer & Company, a Minnesota corporation (hereinafter referred to as Shaffer & Co.) At November 1, 1930, the work on these three contracts was uncompleted and the Bridge Company was indebted to Shaffer & Co. in a substantial amount. At November 1, 1930, no contract had been entered into for the superstructure on the bridge and the status of said contracts was as follows:

	Per cent. completed	Per cent. of completed work paid for	Per cent. of total work unpaid
Engineering	50%	60%	70%
Grading	40%	100%	60%
Substructure	80%	75%	40%
Superstructure	0%	0%	100%

The Bridge Company was without funds or sufficient assurance of funds to enable it to enter into the superstructure contract. Its sole possible source of funds was from the sale of its own shares of capital stock and these could not be sold without a definite program for the completion of the Bridge Project. In this situation, and in order to provide for the construction of the major portion of the superstructure of the bridge out of the net proceeds from the sale of shares of the capital stock of the Bridge Company, the following contracts were entered into, constituting a single integrated plan:

(a) A contract between the Bridge Company and Shaffer & Co. dated November 11, 1930 (hereinafter called the superstructure contract), wherein Shaffer & Co., in consideration of $10,000. paid and 3200 shares of the capital stock [fol. 185] of the Bridge Company to be delivered to it, undertook to complete the superstructure in accordance with certain plans and specifications attached to the contract. The contract provided that the Bridge Company should reimburse Shaffer & Co. at cost plus 15% for all extra work and material on the superstructure that might be ordered by the Bridge Company.

(b) A subcontract dated November 8, 1930, between Shaffer & Co. and McClintic-Marshall Company, a Delaware corporation, whereby the latter undertook to furnish the

steel required by the said plans and specifications for the superstructure and an amendment to said subcontract dated December 4, 1930, whereby McClintic-Marshall Company undertook to furnish certain extra steel, services and equipment required by the Bridge Company but not specified in the said plans and specifications. The obligation for said extras to McClintic-Marshall Company amounted to $30,214.38 under said amendment.

(c) A subcontract dated November 11, 1930, between Shaffer & Co. and Industrial Contracting Company, a Minnesota corporation, whereby the latter, in accordance with the schedule of costs set forth in said contract, undertook to erect the steel comprising the superstructure and to do certain other work and furnish certain materials specified in said subcontract. The obligation to Industrial Contracting Company for extras, in addition to the requirements of the said plans and specifications amounted to approximately $10,000.

(d) An agreement dated November 10, 1930, between Phoenix Finance System, Inc., Shaffer & Co., and the Bridge [fol. 186] Company (hereinafter called the Financing Agreement), whereby Phoenix Finance System, Inc., guaranteed the payments required to be made by Shaffer & Co. to McClintic-Marshall Company and Industrial Contracting Company under the subcontracts above described. The Bridge Company delivered to Phoenix Finance System, Inc. 140 shares of the capital stock of the Bridge Company in consideration for such guarantees and as a further consideration therefor agreed by said contract that if Phoenix Finance System, Inc. was required to pay out any money by reason of such guarantees, the Bridge Company would repay to Phoenix Finance System, Inc. said sum upon demand with interest at 8% per annum after March 1, 1931, and further agreed that Phoenix Finance System, Inc. might take over possession and control of the Bridge project and properties to secure such repayment, in the event of any default of the Bridge Company in the performance of its undertaking. Pursuant to said Financing Agreement, Phoenix Finance System, Inc. executed written guarantees to McClintic-Marshall Company and Industrial Contracting Company, guaranteeing the payments required to be made to them under said subcontracts.

(e) An agreement dated November 26, 1930, between Shaffer & Co. and Thompson & Company whereby Shaffer & Co. endorsed and delivered to Thompson & Company 1400 shares of Class A stock and 1800 shares of Class B stock, being the 3200 shares of stock delivered to Shaffer & Co. under the superstructure contract, for the purpose of enabling Thompson & Company to sell such shares and with the option to Thompson & Company to return any shares unsold by it or to pay for any shares which it did sell at $70 a share or by such consideration other than cash [fol. 187] as it received upon the sale of such shares.

(f) An agreement dated November 26, 1930, between the Bridge Company and Thompson & Company (hereinafter called the Fiscal Agreement) which recited the payment of $10,000. and the delivery of 3200 shares of the capital stock of the Bridge Company to Shaffer & Co. and the necessity for marketing such shares "to provide the money with which John W. Shaffer & Co. will complete said bridge" and the desirability of having the assistance of Thompson & Company in the sale of additional shares of said stock for the Bridge Company. By said agreement Thompson & Company agreed to put forth diligent effort to sell said shares as the fiscal agent of the Bridge Company and the Bridge Company agreed that all sales under the agreement would be on behalf of and would benefit the Bridge Company either directly or indirectly, and agreed to save and hold Thompson & Company harmless and free from loss by reason of any of its operations under the contract and to indemnify it against any loss and to repay to it upon demand the full extent of any such loss.

True copies of said agreements are attached as Exhibits L, M, N, J, K, and I, respectively, to the answer filed herein by Phoenix on October 9, 1939, and struck by this Court November 7, 1939, and said agreements are hereby incorporated herein by reference.

18. On or about March 10, 1931, Phoenix Finance System, Inc., loaned to the Bridge Company $35,000. to be used by the latter, and which was used by it, to pay a part of its indebtedness to Shaffer & Co. under the engineering, grading and substructure contracts above described. The

indebtedness so paid constituted a lien on the bridge properties.

[fol. 188] 19. On or about March 10, 1931, Phoenix Finance System, Inc., loaned to the Bridge Company $15,000. which was paid over by the Bridge Company to Thompson & Company, then acting as fiscal agent for the Bridge Compuany in accordance with the Fiscal Agreement. The payment to Thompson & Company increased the credit balance of the Bridge Company with Thompson & Company to $18,222.9[illegible] By July 11, 1931, this entire credit and all other credits in favor of the Bridge Company had been paid over to the Bridge Company by Thompson & Company.

20. Said loans of $35,000. and $15,000. were made in reliance upon the specific undertaking of the Bridge Company to repay the sums so advanced, which undertaking was evidenced by its promissory note in the amount of $50,000 payable to the order of Phoenix Finance System, Inc. with interest at 8% per annum from March 10, 1931, secured by a mortgage of all of the properties of the Bridge Company. Said mortgage was duly authorized by the Board of Directors of the Bridge Company and ratified by its stockholders and executed and delivered as of March 10, 1931. Said mortgage contained the following provision, inter alia:

"And the said Iowa-Wisconsin Bridge Company further agrees that the said Phoenix Finance System, Inc., at any time during the existence of this indebtedness, or any part thereof, and until the same is fully paid, shall have full power and is hereby authorized as attorney-in-fact for said Iowa-Wisconsin Bridge Company to pay all liens of any kind, whether prior or subsequent, that may in any manner affect the title to the lands, buildings, structures, toll bridge and appurtenances herein and hereby conveyed, and for the repayment of all moneys so paid, together with interest thereon at the rate of eight per cent per annum, payable semi-annually, this indenture shall be like security, in like manner, and with like effect as for the payment of said note."

21. On or about September 24, 1931, Phoenix Finance System, Inc., loaned to the Bridge Company $10,000., in re-
[fol. 189] liance upon the Financing Agreement and said

mortgage agreement. Said loan was made to the Bridge Company to be used by it and was used by it to pay its indebtedness to Industrial Contracting Company in that amount for extra work done and extra materials furnished under the subcontract between it and Shaffer & Co. in addition to that required by the plans and specifications attached to the superstructure contract, which indebtedness constituted a lien on the bridge properties for which the Bridge Company was liable under the superstructure contract.

22. On or about November 10, 1931 Phoenix Finance System, Inc. loaned to the Bridge Company $9,000. in reliance upon said mortgage agreement. Said loan was made to the Bridge Company to be used by it and was used by it to pay an indebtedness to Kremer & Hog in that amount for grading work on the Bridge Project, which indebtedness constituted a lien on the bridge properties for which the Bridge Company was liable under its said contract for grading with Shaffer & Co.

23. On or about December 24, 1931 Phoenix Finance System, Inc. loaned to the Bridge Company $11,262.71 in reliance upon the Financing Agreement and said mortgage. Said loan was consummated by delivering to the Bridge Company United States Treasury Certificates in the par amount of $10,000. Said Treasury Certificates were delivered to the Bridge Company and accepted by it at the cost to Phoenix Finance System, Inc. of $11,262.71, disregarding accrued interest. The loan was made to the Bridge Company to be used by it, and out of the sum of $10,112.71 realized on the sale of said certificates, $9,258.60 was used by it to pay in part its indebtedness to McClintic-Marshall Company for extra labor and materials supplied [fol. 190] for the Bridge Project under the amendment of December 4, 1930 to said subcontract. The Bridge Company was liable for said indebtedness under the superstructure contract and it constituted a lien on the bridge properties.

24. From time to time Phoenix loaned to the Bridge Company for its general corporate purposes, and in reliance upon its agreement to repay the amounts so loaned with interest at 8% per annum the following sums:

January 20, 1932	$3,125.
February 15, 1932	2,000.
February 27, 1932	1,000.
February 7, 1933	6,896.
February 9, 1933	2,910.

Said loan of $3,125 was made and was used to pay taxes on the bridge properties, which constituted a lien thereon. During the period from October 31, 1931 to June 30, 1933 Phoenix and its predecessor in interest, Phoenix Finance System, Inc., furnished to the Bridge Company office space and the services of employees of the reasonable value of $1505.75 which the Bridge Company agreed to repay to Phoenix with interest at 8% per annum, and in February, 1932 paid to Oscar Thorson $400. and to M. White $250. for the account of the Bridge Company and in payment of the salaries due to said Thorson and White from the Bridge Company, which amounts the Bridge Company agreed to repay with interest at 8% per annum. The loans and advances specified in this paragraph were represented in part by promissory notes of the Bridge Company payable to the order of Phoenix with interest at 8% per annum as follows:

$2000.00 dated February 15, 1932

3125.00 dated January 20, 1932

500.00 dated December 31, 1932

12,110.19 dated July 7, 1933.

[fol. 191] 25. From time to time Phoenix and Phoenix Finance System, Inc., directly or through its subsidiary, Thompson & Company, paid out large sums of money to or for the benefit of the Bridge Company under said guarantees and in reliance upon said Financing Agreement and mortgage agreement, the total of all such payments and advances aggregating over $300,000., all of which was repaid except $98,349.46 of loans and advances hereinabove specifically described. No portion of said indebtedness of $98,349.46 has ever been repaid by the Bridge Company to Phoenix and the Bridge Company has no credits and no other claims to set-off against said indebtedness, and no

interest has been paid on any of said indebtedness except $9,390. received by Phoenix from the Bridge Company as interest on bonds issued to it by the Bridge Company, being bonds secured by the trust deed held invalid by the said decree of December 1, 1936.

26. Phoenix has purchased for value and is the owner of all rights of Phoenix Finance System, Inc. and Thompson & Company against the Bridge Company arising out of the transactions hereinabove described.

27. Phoenix alleges that the aggregate of said loans and advances to the Bridge Company which have not been repaid is $98,349.46 and that by such amount the Bridge Company has been unjustly enriched at the expense of Phoenix; that $81,383.60 of such amount constitutes a lien upon the properties of the Bridge Company; and that the Bridge Company should be denied all relief against Phoenix until such amounts have been paid in full together with interest at 8% per annum, and prays this Court to find that the Bridge Company is so indebted to Phoenix and that Phoenix has a lien upon the properties of the Bridge Company in the amount of $81,383.60, and to require the payment of such indebtedness and said interest and the sale of the properties of the Bridge Company to satisfy said [fol. 192] lien. Phoenix alleges that it holds $117,100. par value of first mortgage bonds of the Bridge Company issued to it on account of or as security for a part of such indebtedness, that said bonds are secured by the trust deed held invalid by the decree of December 1, 1936, and said bonds have been repudiated by the Bridge Company, and Phoenix hereby offers to deliver up said bonds and the $50,000. note and mortgage and the several notes described in paragraph 24 hereof to the Bridge Company on the payment of the indebtedness and interest secured thereby.

28. On or about November 26, 1930 the Bridge Company issued and delivered to Shaffer & Co. 3200 shares of its capital stock pursuant to the superstructure contract. On or about that date Shaffer & Co. delivered said shares to Thompson & Company for sale for the benefit of the Bridge Company under the Fiscal Agreement and the agreement hereinabove described between Shaffer & Co. and Thompson & Company. As at December 31, 1931

Thompson & Company had sold 2174 of said shares and had paid Shaffer & Co., $70 a share for the shares so sold. In addition it had advanced to Shaffer & Co. directly and indirectly, a sum in excess of $51,700., for which it held as security 477 shares of A stock and 549 shares of B stock of the Bridge Company. In addition Thompson & Company advanced to the Bridge Company $3,400 on the security of 40 shares of A stock and $2,125. on the security of 25 shares of B stock of the Bridge Company. In settlement of a portion of said advances the Bridge Company delivered to Phoenix, as the successor in interest of Thompson & Company, $60,500. par value of first mortgage bonds, and Phoenix transferred to the Bridge Company said 477 and said 40 shares of A stock, which the Bridge Company still holds as treasury stock. Said first mortgage bonds were secured by the trust deed held invalid by this Court by its decree of December 1, 1936 and have been repudiated by the Bridge Company. The Bridge Company [fol. 193] should be denied all relief against Phoenix until it has restored to Phoenix said 517 shares or repaid to it the indebtedness secured thereby which it has heretofore failed and refused to do, and prays this Court to find the amount of said indebtedness and to require the payment thereof or the return of said shares. Phoenix offers to return to the Bridge Company said first mortgage bonds upon the return of said shares or the repayment of said indebtedness.

29. Phoenix alleges that it has at all times stood ready and now offers to make a full and complete accounting and to do equity in the premises and to render to the Bridge Company that to which it is in equity and good conscience entitled.

Seventh Defense

Without waiving the defenses heretofore urged, Phoenix shows that it would be inequitable to construe the decree of December 1, 1936 herein as set forth in the Supplemental and Ancillary Bill herein or to grant the Bridge Company the relief now prayed, and in support thereof Phoenix re-alleges the matters and things set forth in paragraphs 17 to 29, inclusive, hereof, and further alleges:

30. The engineering, grading and substructure contracts described in paragraph 17 hereof were approved by the Board of Directors of the Bridge Company or by its Executive Committee, free from any control or domination by Shaffer or those associated with him in Shaffer & Co. or in Standard Shares Holding Company, and on November 1, 1930 were valid and subsisting contracts of the Bridge Company and continued to be valid and subsisting contracts until August 6, 1931, when the said contracts were terminated by an agreement between the Bridge Company and Shaffer & Co. There was no agreement or understanding, express or implied, in said contracts or otherwise binding upon the Bridge Company or Shaffer & Co. limiting the cost of the bridge or fixing a final date for its completion.

[fol. 194] 31. Prior to the fall of 1930 there had been no contact between Shaffer and his associates and Phoenix, Phoenix Finance System, Inc., Thompson & Company, or J. A. Thompson, and none of the latter had any interest in the Phoenix Building in Minneapolis, Minnesota, or any office in that building.

32. There was never at any time any agreement between Shaffer or his associates or Shaffer & Co. with said John A. Thompson, Phoenix, Phoenix Finance System, Inc., or Thompson & Company that the latter or any of them should exercise any control over the Bridge Company, and neither collectively nor individually did they ever control or dominate the Bridge Company.

33. The payment of $10,000. and delivery of 3200 shares of stock to Shaffer & Co. under the superstructure contract did not constitute payment in full for the superstructure, and did not purport to cover extra work, materials and services not specified in the plans and specifications attached to said contract. After the making of said contract, the plans were modified to increase the safety of the bridge, and such modification increased the cost of the superstructure by approximately $46,613.98, for which the Bridge Company became liable to Shaffer & Co. under the superstructure contract.

34. There was adequate consideration to the Bridge Company for the 140 shares of stock issued to Phoenix

Finance System, Inc. in accordance with the Financing Agreement and the obligation of the Bridge Company to indemnify Phoenix Finance System, Inc. as provided in said agreement. The consideration was the agreement on the part of Phoenix Finance System, Inc. to guarantee all payments to McClintic-Marshall Company and Industrial Contracting Company under the superstructure sub-contracts, including extras, which guarantee was indispensable [fol. 195] to the making of the superstructure contract or the superstructure subcontracts.

35. There was no default by Shaffer & Co. under its several contracts and no entries were made on the Bridge Company books to make it appear that Shaffer & Co. had defaulted under any such contracts.

36. No fictitious entries were made on the books of the Bridge Company with respect to said loans of $35,000. and $15,000. of March 10, 1931 or any other loans or advances to the Bridge Company, but the facts as to all said loans and advances were correctly recorded on the books of the Bridge Company and in the minutes of the meetings of its stockholders and Board of Directors.

37. The settlement by the Bridge Company with Shaffer & Co. and its associates in August, 1931 did not create any obligation on the part of Phoenix Finance System, Inc., or Thompson & Company, or Phoenix, or John A. Thompson, to assume any obligations of Shaffer & Co. to its subcontractors or specifically to assume the obligation to pay Industrial Contracting Company the sum of $10,000. or any part thereof, or to pay McClintic-Marshall Company the indebtedness described in paragraph 23 hereof. Said settlement did not relieve the Bridge Company of its liability to pay said indebtedness and its liability to Phoenix Finance System, Inc. under said Financing Agreement.

38. All acts by J. A. Thompson as President of the Bridge Company and by directors or employees of Phoenix or Phoenix Finance System, Inc. serving as directors or employees of the Bridge Company, and all transactions with the Bridge Company on the part of Phoenix, Phoenix Finance System, Inc. and Thompson & Company, were done and entered into in good faith for the benefit and pro-

tection of the Bridge Company and with no concealment of any material facts.

39. To the extent that the findings of this Court as en- [fol. 196] tered December 1, 1936 and its decree are inconsistent with the foregoing allegations, the said findings and decree are contrary to the facts and are the result of the tactics of the interveners and their counsel in the trial of the foreclosure proceedings, first, in presenting to this Court a voluminous record consisting largely of testimony and exhibits relating to immaterial and irrelevant issues, so confused, ambiguous and disorderly as to make it difficult, if not impossible, for the Court to ascertain the facts and to compel the Court to rely upon the representations of counsel, and second, in making false representations or inadvertent misrepresentations, particularly with respect to the relationship between John A. Thompson and Shaffer prior to November 1, 1930, the status of completion of the Bridge Project at November 1, 1930, the fact that the 3200 shares of stock and $10,000. paid to Shaffer & Co. under the superstructure contract did not cover or purport to cover extras under that contract nor pay for completion of the Bridge Project, the fact that the Bridge Company was indebted to Shaffer & Co. on March 10, 1931 far in excess of $35,000., and the fact that the loans to the Bridge Company by Phoenix Finance System, Inc. in September and December, 1931 were for the purpose of enabling it to make payments to Industrial Contracting Company and McClintic-Marshall Company for extras under said superstructure contract, for which the Bridge Company was liable under said contract. By reason thereof the said findings and decree are contrary to the facts in other respects, not herein specified.

40. As to said matters, Phoenix has not had its day in court. Counsel for complainant Trustees in the foreclosure proceedings had complete charge of the litigation, as this Court found by its order of January 5, 1937. Said counsel acted throughout the proceedings under the belief that the only issues before the Master to whom said cause [fol. 197] had been referred were the validity of the deed of trust, the existence of a default, and the right to a foreclosure, and that any question as to the validity of the bonds or the consideration received by the Bridge Com-

pany therefor was reserved for determination at a second stage of the proceedings. This belief was founded in part upon the prevailing practice with respect to foreclosure proceedings in the United States courts and in part upon the apparent ruling of the Master that such would be the procedure before him. In the said proceedings before the Master and on exceptions to the Master's report and at other times in the proceedings, counsel for the interveners and counsel for the Bridge Company repeatedly asserted and represented that the indebtedness of the Bridge Company to any bondholder was not in issue and could not be adjudicated in such foreclosure proceedings. Relying upon such representations and their belief as to the procedure to be followed, the Trustees offered substantially no evidence on their prima facie case on the foreclosure proceedings with respect to the consideration for any of the bonds, and the proofs offered in their behalf were merely the prima facie proofs in a foreclosure proceeding. Almost no cross-examination was attempted of the various witnesses called by the Bridge Company and the interveners in said cause and no evidence whatever was offered in rebuttal of the testimony of such witnesses, and counsel for the Trustees notified many prospective witnesses that their testimony would be required at a later stage of the proceedings.

41. Relying upon the representations of counsel for the interveners and the defendant as to the issues, sharing the belief of counsel for the Trustees that any question with respect to the validity of the bonds was reserved for a later stage of the proceedings, and recognizing that Phoenix was only a nominal party to the proceedings, counsel for Phoenix offered no evidence in said foreclosure proceedings.

42. By his report in the foreclosure proceedings, the Master found that over $27,000. of bonds secured by the trust deed before him were issued for a valid consideration [fol. 198] or to secure bona fide indebtedness of the Bridge Company and that the Trustees were entitled to a decree of foreclosure, thereby leaving the proofs as to the remaining bonds still subject to determination after such a decree should be entered. This Court held that only $15,000. of said bonds had been issued for a valid consid-

eration, and that the amount of said bonds did not justify a foreclosure and proceeded to enter a final decree, thereby terminating the foreclosure proceedings and the rights of bondholders to prove the consideration for their bonds in said cause.

43. The foregoing matters were brought to the attention of this Court on a petition for rehearing filed in behalf of Phoenix, but this Court refused to exercise its discretion and grant the rehearing on the ground that Phoenix had failed to comply with an order of the Court to produce its books and records. The order referred to was entered April 24, 1934 and directed that:

"the defendant, Phoenix Finance Corporation, produce at its office in Des Moines, Iowa, all its books and records appertaining to the business and affairs of the Iowa-Wisconsin Bridge Company within ten days from date of this order and submit them to the inspection of the intervener and its counsel and accountant." (Printed Record, p. 96.)

The books were duly produced as required by said order and copies of the pertinent entries were furnished to counsel for the interveners and the ruling of the Court on the Petition for Rehearing was solely the result of the deliberate misrepresentations to the Court by counsel for the interveners, in response to the petition for rehearing, that Phoenix had defied the order of the Court with respect to such books and papers.

44. In support of said petition for rehearing, counsel for Phoenix submitted affidavits of witnesses to establish the facts heretofore recited with respect to the matters embodied in the findings and decree of the Court and the understanding of counsel as to the two-stage procedure to be followed. It endeavored to procure affidavits from [fol. 199] other witnesses to substantiate the allegations of the petition for rehearing, but F. A. Ontjes, attorney for the interveners, the intervener, Thomas Bakewell, and Irene Bell, an employee or associate of said Ontjes, made it impossible to obtain such affidavits by visiting prospective witnesses and falsely representing to them that John A. Thompson was a crook, that he had been found guilty of conspiracy, that he was soon to be sent to the penitentiary, that any former or present stockholder or director of the

Bridge Company would likewise be sent to the penitentiary if he signed any document or affidavit for a representative of Phoenix, and cautioned such witnesses to shun Thompson and to sign no documents. As a consequence, a large number of former and then stockholders and directors and others whose affidavits were vital to the presentation of the true facts to the Court refused to discuss the facts with any representative of Phoenix or to sign any affidavit for Phoenix.

45. Phoenix asserts that it would be contrary to equity and good conscience to construe the findings and decree of December 1, 1936 as any adjudication with respect to the validity of said $50,000. mortgage or the matters and things involved in the litigation in the State of Delaware brought by Phoenix against the Bridge Company or to grant to the Bridge Company any affirmative relief with respect thereto.

CASPER SCHENK,
917 Des Moines Building,
Des Moines, Iowa.

JAMES R. MORFORD,
829 Delaware Trust Bldg.,
Wilmington, Del.

HAROLD W. NORMAN,
(HAROLD W. NORMAN and
EDWARD A. ZIMMERMAN—
ZIMMERMAN AND NORMAN),
111 West Monroe St.,
Chicago, Illinois
Attorneys for Phoenix Finance Corporation.

Filed in the District Court November 27, 1939.

[fol. 200] (Motion of Iowa-Wisconsin Bridge Company to Strike Answer and Counterclaim of Phoenix Finance Corporation.)

Comes now defendant Iowa-Wisconsin Bridge Company by its attorneys and moves the court as follows, to-wit:

(1) To strike the "Answer and Counterclaim" of Phoenix Finance Corporation in its entirety for the reasons

that it is saturated with alleged evidence, argument, foreign matter and conclusions and is in violation of Rule 8 of the Rules of Civil Procedure, particularly sub-division (b), and is prolix.

(2) Subject to the Court's ruling on division (1) hereof, moves the court to strike from paragraph 1 of said Answer and Counterclaim the last three lines commencing with the words "but alleges" on page one and the remainder of said paragraph on page two, on the ground that the same is argument and conclusions.

(3) Subject to the Court's ruling on division (1) hereof, moves the Court to strike from said Answer and Coun- [fol. 201] terclaim alleged defenses and counterclaim two to seven inclusive, consisting of paragraphs 13 to 45 both inclusive and to strike each of said defenses and counterclaim and each of said paragraphs separately for the following reasons, to-wit:

(a) That the same are saturated with alleged evidence, argument, foreign matter and conclusions in violation of Rule 8 of the Rules of Civil Procedure and particularly subdivision (b) and are prolix.

(b) That the matters pleaded in said alleged defenses and paragraphs are insufficient in law to constitute a defense to the Supplemental and Ancillary Bill of Complaint herein and are not responsive to the issues tendered by the Supplemental and Ancillary Bill and are repetitious, incompetent, irrelevant and redundant matter.

(c) That the matters involved in this cause and presented by the Ancillary and Supplemental Bill as amended have been adjudicated and that a counterclaim cannot be filed subsequent to such adjudication; that the matters alleged do not constitute any basis for counterclaim and that the alleged counterclaim is included in the Answer without leave or permission of Court, and that the matters alleged in said paragraphs are sham, impertinent and contemptuous matter.

(4) Subject to the court's ruling on divisions (1) and (3) hereof, to strike the sixth defense and counterclaim and seventh defense consisting of paragraphs 17 to 45 both inclusive and to strike each of said defenses and counter-

claim and each of said paragraphs thereof separately for all the reasons stated in division (3) hereof.

F. A. ONTJES,
W. C. GREEN,
Attorneys for Defendant,
Iowa-Wisconsin Bridge Co.

Filed in the District Court, November 28, 1939.

[fol. 202] (Notice of Hearing of Motion to Strike Answer and Counterclaim.)

To Casper Schenk, James R. Morford and H. W. Norman, Attorneys for Phoenix Finance Corporation:

You And Each Of You Are Hereby Notified that the defendant, Iowa-Wisconsin Bridge Company, has filed a Motion to Strike in the above entitled cause, a copy of which is hereto attached and made a part hereof, and that said motion will come on for hearing and submission at Dubuque, Iowa, in the United States District Court Room on December 5th, 1939 at ten o'clock A. M., or as soon thereafter as the same can be heard by the Court.

F. A. ONTJES,
W. C. GREEN,
Attorneys for Defendant.
Iowa-Wis. Bridge Company.

We hereby accept service of the foregoing Notice and acknowledge receipt of copy thereof this 28th day of November, 1939.

JAMES R. MORFORD,
H. W. NORMAN,
CASPER SCHENK,
Attorneys for Phoenix Finance Corporation.

Filed in the District Court, December 1, 1939.

[fol. 203] Motion to Strike.

Comes now defendant Iowa-Wisconsin Bridge Company by its attorneys and moves the court as follows, to-wit:

(1) To strike the "Answer and Counterclaim" of Phoenix Finance Corporation in its entirety for the reasons that it is saturated with alleged [eveidence,] argument, foreign matter and conclusions and is in violation of Rule 8 of the Rules of Civil Procedure, particularly sub-division (b), and is prolix.

(2) Subject to the Court's ruling on division (1) hereof, moves the court to strike from paragraph 1 of said Answer and Counterclaim the last three lines commencing with the words "but alleges" on page one and the remainder of said paragraph on page two, on the ground that the same is argument and conclusions.

(3) Subject to the Court's ruling on division (1) hereof, moves the Court to strike from said Answer and Counterclaim alleged defenses and counterclaim two to seven inclusive, consisting of paragraphs 13 to 45 both inclusive and to strike each of said defenses and counterclaim and each of said paragraphs separately for the following reasons, to-wit:

(a) That the same are saturated with alleged evidence, argument, foreign matter and conclusions in violation of Rule 8 of the Rules of Civil Procedure and particularly subdivision (b) and are prolix.

(b) That the matters pleaded in said alleged defenses and paragraphs are insufficient in law to constitute a defense to the Supplemental and Ancillary Bill of Complaint [fol. 204] herein and are not responsive to the issues tendered by the Supplemental and Ancillary Bill and are repetitious, incompetent, irrelevant and redundant matter.

(c) That the matters involved in this cause and presented by the Ancillary and Supplemental Bill as amended have been adjudicated and that a counterclaim cannot be filed subsequent to such adjudication; that the matters alleged do not constitute any basis for counterclaim and that the alleged counterclaim is included in the Answer without leave or permission of Court, and that the matters

alleged in said paragraphs are sham, impertinent and contemptuous matter.

(4) Subject to the court's ruling on divisions (1) and (3) hereof, to strike the sixth defense and counterclaim and seventh defense consisting of paragraphs 17 to 45 both inclusive and to strike each of said defenses and counterclaim and each of said paragraphs thereof separately for all the reasons stated in division (3) hereof.

F. A. ONTJES,
W. C. GREEN,
Attorneys for Defendant,
Iowa-Wisconsin Bridge Co.

[fol. 205] (Order Striking Certain Matter From Answer and Counterclaim.)

On this 18th day of December, 1939, the above entitled cause came on for hearing on the motion of the Iowa-Wisconsin Bridge Company, the original principal defendant, and now the complainant in the Supplemental and Ancillary Complaint, to strike the answer and so-called counterclaim to said supplemental and ancillary complaint, and alternatively to strike various portions thereof described in the motion. And said motion having been orally argued by consent of Court, and briefs filed and considered,

It is now, therefore, Ordered:

First. That there be stricken from said answer, paragraph one "First Defense", all that part on page one following the word "only" on the next to the last line of said paragraph, and the quoted paragraph at the top of page two of said answer.

Second. That there be stricken from said answer, numerical paragraphs 13 to 45 inclusive, being designated defenses second to seventh inclusive, for the reason that in [fol. 206] such paragraphs and defenses the respondent, Phoenix Finance Corporation, is clearly endeavoring to relitigate questions of fact and law which were fully litigated and opportunity given to litigate on the trial of the principal case, in which trial and decision all accounts, indebtedness and matters entering into the consideration of

the issue of each and all of the bonds secured by the mortgage sought to be foreclosed were in question, and were considered and determined.

The Court being of opinion that the remaining matters, including admissions and denials set forth in the first division of said answer designated as "First Defense", are sufficient for the proper consideration and determination of all issues presented by said supplemental and ancillary complaint, no further time is granted or permission granted to further amend said answer.

To all of which an exception is reserved to the Phoenix Finance Corporation, respondent.

Done and Ordered this 18th day of December, 1939, at Sioux City, Iowa, to be entered of record in the Eastern Division.

GEO. C. SCOTT,
United States District Judge.

Filed in the District Court, December 18, 1939.

[fol. 207] (Notice of Phoenix Finance Corporation of Intention to Take Depositions of George E. Preuss, et al.)

In compliance with Rule 5 of the United States District Court for the Northern District of Iowa, Phoenix Finance Corporation, defendant to the Supplemental and Ancillary Bill as Amended of the Iowa-Wisconsin Bridge Company, hereby files its notice of intention to take the depositions of the following parties;

George E. Preuss, a resident of Chicago, Illinois, 6707 N. Greenview Avenue;

Edgar S. Gage, a resident of Chicago, Illinois, 10640 S. Claremont Avenue;

Albert Penn, a resident of Goshen, Indiana;

Lee J. Skoner, a resident of Chicago, Illinois, 3039 North Avers Avenue;

John A. Thompson, a resident of St. Petersburg, Florida, 5556 16th Avenue, N. E.

The particular occasion for taking the testimony of the foregoing witnesses in the form of depositions is their residence without the jurisdiction of this Court and of the State of Iowa.

[fol. 208] Phoenix Finance Corporation will proceed with due diligence to take the foregoing depositions in accordance with the rules of Civil Procedure, giving hereafter due notice in compliance with said rules to all parties entitled thereto.

HAROLD W. NORMAN,
JAMES R. MORFORD,
CASPER SCHENK,
Attorneys for Phoenix Finance Corporation.

Filed in the District Court, December 28, 1939.

[fol. 209] (Notice of Taking Depositions.)

To Iowa-Wisconsin Bridge Company, or to its Attorneys, F. A. Ontjes and W. C. Green:

You are hereby notified that, in accordance with the Notice of Intention to Take Depositions, heretofore filed in the above entitled cause, the Depositions of George E. Preuss, a resident of Chicago, Illinois, 6707 N. Greenview Avenue; Edgar S. Gage, a resident of Chicago, Illinois, 10640 S. Claremont Avenue; and Lee J. Skoner, a resident of Chicago, Illinois, 3039 North Avers Avenue, will be taken upon oral examination at No. 1709 Harris Trust Building, in the City of Chicago, Cook County, Illinois, on January 29, 1940, at 10:00 o'clock A. M., before Roy Fuller, Notary Public and Court Reporter, or before some other officer then and there qualified to take the same as authorized by law.

JAMES R. MORFORD,
HAROLD W. NORMAN,
CASPER SCHENK,
Attorneys for Phoenix Finance Corporation.

Acceptance of Service.

Service of the foregoing Notice is hereby acknowledged and copies thereof received on this 24 day of January, 1940.

F. A. ONTJES,
W. C. GREEN,
Attorneys for Iowa-Wisconsin Bridge Company.

Filed in the District Court, April 20, 1940.

[fol. 210] (Notice of Taking Depositions.)

To Iowa-Wisconsin Bridge Company, or to its Attorneys, F. A. Ontjes and W. E. Green:

You are hereby notified that, in accordance with the Notice of Intention to Take Depositions heretofore filed in the above entitled cause, the Depositions of George E. Preuss, a resident of Chicago, Illinois, 6707 N. Greenview Avenue; Edgar S. Gage, a resident of Chicago, Illinois, 10640 S. Claremont Avenue; and Lee J. Skoner, a resident of Chicago, Illinois, 3039 North Avers [Avnue], will be taken upon oral examination at No. 1709, Harris Trust Building, in the City of Chicago, Cook County, Illinois, on February 29, 1940, at 10 o'clock A. M., before Roy Fuller, Notary Public and Court Reporter, or before some other officer then and there qualified to take the same as authorized by law.

JAMES R. MORFORD,
HAROLD W. NORMAN,
CASPER SCHENK,
Attorneys for Phoenix Finance Corporation.

Acceptance of Service.

Service of the foregoing notice is hereby acknowledged and copies thereof received on this 23rd day of January, 1940.

F. A. ONTJES,
W. C. GREEN,
Attorneys for Iowa-Wisconsin Bridge Company.

Filed in the District Court, April 20, 1940.

[fol. 211] (Motion of Iowa-Wisconsin Bridge Company to Strike Notices of Intention to Take Depositions of George E. Preuss, et al.)

Comes now the defendant Iowa-Wisconsin Bridge Company and moves the court as follows:

(a) To strike from the files the notice of intention to take depositions filed by the Phoenix Finance Corporation.

(b) To enter an order that the depositions of the parties therein specified shall not be taken.

(c) To enter an order that the depositions of George E. Preuss, Edgar S. Gage and Lee J. Skoner, specified in the Phoenix Finance Corporation's notice to take depositions shall not be taken.

(d) To set and to proceed with the hearing on permanent injunction.

on the following grounds and for the following reasons to-wit:

(1) That this cause has been tried on its merits and the time for taking depositions has expired.

(2) That Albert Penn and John A. Thompson mentioned in said notice of intention to take depositions are officers and directors of the Phoenix Finance Corporation and have been in attendance on the various hearings had [fol. 212] with respect to the Supplemental and Ancillary Bill as Amended and Answer thereto herein and that no reason exists or has been assigned why the said Phoenix Finance Corporation cannot have them present on the hearing for permanent injunction, nor has it asserted that they will not be present at such hearing.

(3) That said George E. Preuss, Edgar S. Gage and Lee J. Skoner named in the notice served for taking of depositions are accountants.

That George E. Preuss was not present at the trial of this cause nor at the hearing of exceptions nor at hearing of petition for rehearing and is not in position to give any competent, material or relevant evidence to what was involved in this cause. That the first time his name appeared in the record in this case was when it was included

in Phoenix Finance Corporation's notice of intention to take depositions.

That said Lee J. Skoner is an accountant with Ernst and Ernst and did certain work for the Phoenix Finance Corporation and made an affidavit, which is attached to said corporation's Petition for Rehearing in this cause, wherein he purported to give certain accountancy figures. (R. 308-312) That he is not in a position to give any competent, relevant or material evidence as to what was involved in the hearings in this cause, the record itself in this case being the best evidence.

That the said Edgar S. Gage was a witness on the trial of this cause and his testimony appears in the transcript filed herein; that he made an affidavit for the Phoenix Finance Corporation, which is attached to its Petition for Rehearing on file in this cause. (R. 271-276) That he is not in a position to give any competent, relevant or material evidence as to what was involved in the hearings in this cause, the record itself being the best evidence.

[fol. 213] That said George E. Preuss, Edgar S. Gage and Lee J. Skoner were not present at the stockholders' meetings referred to in the Supplemental and Ancillary Bill as Amended and it is not alleged therein that they wrote any of the letters referred to therein; and on the contrary, it is admitted in Phoenix Finance Corporation's Answer that said letters were written by John A. Thompson substantially as alleged in said Ancillary and Supplemental Bill.

That this Court has stricken from the Answer of Phoenix Finance Corporation its alleged defenses Second to Seventh both inclusive; and that any evidence on the part of such pretended witnesses as to accounting, books or records would be wholly incompetent, irrelevant and immaterial as there is no such issue before the court; and that said witnesses are not in a position to give competent, relevant or material evidence under the issues joined.

That the Iowa-Wisconsin Bridge Company alleges and charges that the said Phoenix Finance Corporation is merely attempting to take depositions with respect to matters stricken from the allegations of the Answer and to delay

the hearing on permanent injunction and to harass and annoy the Bridge Company.

That the time for the taking of the depositions mentioned in said notice for taking depositions has expired and will have expired before said depositions can be taken.

F. A. ONTJES,
W. C. GREEN,
Attorneys for Iowa-Wisconsin Bridge Company.

State of Iowa,
Cerro Gordo County.—ss.:

I, F. A. Ontjes, being first duly sworn on oath depose and say that I am attorney for the Iowa-Wisconsin Bridge [fol. 214] Company; that I have read the statements contained in the foregoing motion and that the statements therein contained are true as I verily believe.

F. A. ONTJES.

Subscribed and sworn to before me by the said F. A. Ontjes this 23rd day of January A. D. 1940.

(Seal)

F. T. BARRETT,
Notary Public in and for Cerro Gordo County, Iowa.

Filed in the District Court January 29, 1940.

[fol. 215] (Motion and Application of Iowa-Wisconsin Bridge Company for an Order that Depositions of George E. Preuss, et al., Be Not Taken Until Further Order of Court.)

Comes now the defendant Iowa-Wisconsin Bridge Company and respectfully shows to this Honorable Court that the Phoenix Finance Corporation on the 23rd day of January, 1940, served a notice for the taking of depositions of George E. Preuss, Edgar S. Gage and Lee J. Skoner in Chicago, Illinois, on February 29th, 1940; that this defendant immediately prepared a motion for an order that said depositions be not taken (Rule 30b) and on the 23rd day of

January, 1940, mailed the same to the Clerk of this Court and that said Motion was filed the forenoon of January 24th; and on January 23, 1940, this defendant also mailed notice for hearing of said motion at Dubuque on the 6th day of February, 1940, with copy of said motion thereto attached to Casper Schenk Des Moines Building, Des Moines, Iowa, attorney for Phoenix Finance Corporation, for acceptance of service; that service thereof was accepted on the afternoon of the 24th day of January and the Phoenix Finance Corporation on the 24th day of January in the afternoon served another notice for the taking of the depositions of the same witnesses in the same city on January 29, 1940.

[fol. 216] That this defendant then immediately prepared a further motion, making the same motion with respect to the last notice as filed with respect to the first notice, which has been mailed to the Clerk of this Court for filing; and that notice of the hearing of such further motion for the 6th day of February, 1940, at Dubuque with copy of said motion thereto attached has been mailed to said Casper Schenck this 24th day of January as provided in Rule 5b.

That the Phoenix Finance Corporation has pending in the Superior Court of New Castle County, Wilmington, Delaware, an action against the Iowa-Wisconsin Bridge Company, wherein said Phoenix is attempting to recover on alleged toll tickets, the sum of $5,000.00 with interest thereon; that the Phoenix Finance Corporation has had said cause set for trial for the 31st day of January, 1940, and has served notices for the taking of depositions in said cause at Des Moines, Iowa, on January 27th, 1940, and that the bridge company's counsel will have to be present at the taking of such depositions; and that as soon as said depositions are completed it will be necessary for the bridge company's counsel to proceed to Delaware, to be there a day in advance for said trial; and that there is not sufficient time intervening between the 27th day of January and the 31st day of January for the Bridge Company's counsel to be present at the taking of depositions in this cause under the situation on the 29th day of January; that the said second notice served in this cause under the situation is unreasonable.

That the motions for an order that the depositions of the witnesses specified in said notices be not taken under the rules of this Court and the notices served thereof will come on for hearing on the 6th day of February, 1940, at Dubuque; and that to permit said Phoenix Finance Corporation to take said depositions on the 29th day of Janu- [fol. 217] ary, 1940, would deprive the bridge company of the benefit of the Rule 30b entitling it to a ruling on said motions before any such depositions are taken.

Wherefore, defendant Iowa-Wisconsin Bridge Company asks this Honorable Court to enter an order that said depositions shall not be taken until after said motions have been ruled upon by this court, and then only if this court rules that they may be taken. (Rule 30a—Rule 6b.)

F. A. ONTJES,
W. C. GREEN.

State of Iowa,
Cerro Gordo County.—ss.:

I, F. A. Ontjes, being first duly sworn on oath depose and say that I am an attorney for the Iowa-Wisconsin Bridge Company and have read the statements contained in the foregoing application and motion and know the contents thereof and that the statements therein contained are true as I verily believe.

F. A. ONTJES.

Subscribed and sworn to before me by the said F. A. Ontjes this 24th day of January, A. D., 1940.

(Seal) F. T. BARRETT,
Notary Public.

Filed in the District Court January 25, 1940.

[fol. 218] (Further Motion of Iowa-Wisconsin Bridge Company for Order that Depositions of George A. Preuss, et al., Be Not Taken.)

Comes now the defendant, Iowa-Wisconsin Bridge Company and shows this Honorable Court that a notice was served by the Phoenix Finance Corporation on the 23rd day of January, 1940, for the taking of the depositions of

George E. Preuss, Edgar S. Gage and Lee J. Skoner on February 29th, 1940, in Chicago, Illinois; that this defendant immediately prepared a motion for an order that said depositions be not taken and mailed the same to the Clerk of this Court for filing and that the same was filed on the forenoon of January 24th, 1940, and that this defendant also on the 23rd day of January mailed to Casper Schenk, counsel for Phoenix Finance Corporation, four copies thereof, together with notice of time of hearing for acceptance of service; that service of said notice was accepted on the afternoon of the 24th day of January, 1940; and the said Phoenix Finance Corporation in the afternoon of said day served another notice for the taking of the same depositions at the same place on January 29th, 1940, at ten o'clock A. M.

The defendant, Iowa-Wisconsin Bridge Company, makes the same motion with respect to said last notice and moves [fol. 219] the Court for an order that said depositions be not taken for all the reasons set forth in the motion heretofore filed with respect to the first notice, which motion is hereby made a part hereof.

F. A. ONTJES,
W. C. GREEN,
Attorneys for Iowa-Wisconsin Bridge Company.

State of Iowa,
Cerro Gordo County.—ss.:

I, F. A. Ontjes, being first duly sworn on oath depose and say that I have read the statements contained in the foregoing motion and that the statements therein contained are true as I verily believe.

F. A. ONTJES.

Subscribed and sworn to before me by the said F. A. Ontjes this 24th day of January, A. D., 1940.

(Seal)

F. T. BARRETT,
Notary Public in and for Cerro Gordo County, Iowa.

Filed in the District Court January 25, 1940.

[fol. 220] (Notice of Hearing of Motion For an Order that Depositions of George E. Preuss, et al., Be Not Taken.)

To Casper Schenk, James R. Morford and H. W. Norman, attorneys for Phoenix Finance Corporation:

You and Each of You Are Hereby Notified that the defendant, Iowa-Wisconsin Bridge Company, has filed a motion in the above entitled cause, a copy of which is hereto attached and made a part hereof, and that said motion will come on for hearing and submission at Dubuque, Iowa in the United States District Court Room on February 6th, 1940, or as soon thereafter as the same can be heard by the court.

F. A. ONTJES,
W. C. GREEN,
Attorneys for Defendant,
Iowa-Wisconsin Bridge Company.

We hereby accept service of the foregoing Notice and acknowledge receipt of copy of Motion thereto attached this 24th day of January, A. D., 1940.

JAMES R. MORFORD,
H. W. NORMAN,
CASPER SCHENK.
Attorneys for Phoenix
Finance Corporation.

Filed in the District Court January 25, 1940.

[fol. 221] (Motion of Iowa-Wisconsin Bridge Company to Strike from Files Notice of Intention to Take Depositions of George E. Preuss, et al., by Phoenix Finance Corporation.)

Comes now the defendant Iowa-Wisconsin Bridge Company and moves the court as follows:

(a) To strike from the files the notice of intention to take depositions filed by the Phoenix Finance Corporation.

(b) To enter an order that the depositions of the parties therein specified shall not be taken.

(c) To enter an order that the depositions of George E. Preuss, Edgar S. Gage and Lee J. Skoner, specified in the Phoenix Finance Corporation's notice to take depositions shall not be taken.

(d) To set and to proceed with the hearing on permanent injunction.

on the following grounds and for the following reasons to-wit:

(1) That this cause has been tried on its merits and the time for taking depositions has expired.

(2) That Albert Penn and John A. Thompson mentioned in said notice of intention to take depositions are officers and directors of the Phoenix Finance Corporation and have been in attendance on the various hearings had with respect [fol. 222] to the Supplemental and Ancillary Bill as Amended and Answer thereto herein and that no reason exists or has been assigned why the said Phoenix Finance Corporation cannot have them present on the hearing for permanent injunction, nor has it asserted that they will not be present at such hearing.

(3) That said George E. Preuss, Edgar S. Gage and Lee J. Skoner named in the notice served for taking of depositions are accountants.

That George E. Preuss was not present at the trial of this cause nor at the hearing of exceptions nor at hearing of petition for rehearing and is not in position to give any competent, material or relevant evidence as to what was involved in this cause. That the first time his name appeared in the record in this case was when it was included in Phoenix Finance Corporation's notice of intention to take depositions.

That said Lee J. Skoner is an accountant with Ernst and Ernst and did certain work for the Phoenix Finance Corporation and made an affidavit, which is attached to said corporation's Petition for Rehearing in this cause, wherein he purported to give certain accountancy figures. (R. 308-312) That he is not in a position to give any competent, relevant or material evidence as to what was involved in

the hearings in this cause, the record itself in this case being the best evidence.

That the said Edgar S. Gage was a witness on the trial of this cause and his testimony appears in the transcript filed herein; that he made an affidavit for the Phoenix Finance Corporation, which is attached to its Petition for Rehearing on file in this cause. (R. 271-276) That he is not in a position to give any competent, relevant or material evidence as to what was involved in the hearings in this cause, the record itself being the best evidence.

[fol. 223] That the said George E. Preuss, Edgar S. Gage and Lee J. Skoner were not present at the stockholders' meetings referred to in the Supplemental and Ancillary Bill as Amended and it is not alleged therein that they wrote any of the letters referred to therein; and on the contrary, it is admitted in Phoenix Finance Corporation's Answer that said letters were written by John A. Thompson substantially as alleged in said Ancillary and Supplemental Bill.

That this Court has stricken from the Answer of Phoenix Finance Corporation its alleged defenses Second to Seventh both inclusive; and that any evidence on the part of such pretended witnesses as to accounting, books or records would be wholly incompetent, irrelevant and immaterial as there is no such issue before the court; and that said witnesses are not in a position to give competent, relevant or material evidence under the issues joined.

That the Iowa-Wisconsin Bridge Company alleges and charges that the said Phoenix Finance Corporation is merely attempting to take depositions with respect to matters stricken from the allegations of the Answer and to delay the hearing on permanent injunction and to harass and annoy the Bridge Company.

That the time for the taking of the depositions mentioned in said notice for taking depositions has expired and will have expired before said depositions can be taken.

F. A. ONTJES,
W. C. GREEN,
Attorneys for Iowa-Wisconsin
Bridge Company.

State of Iowa,
Cerro Gordo County.—ss.:

I, F. A. Ontjes, being first duly sworn on oath depose and say that I am attorney for the Iowa-Wisconsin Bridge [fol. 224] Company; that I have read the statements contained in the foregoing motion and that the statements therein contained are true as I verily believe.

F. A. ONTJES.

Subscribed and sworn to before me by the said F. A. Ontjes this 23rd day of January, A. D., 1940.

(Seal)

F. T. BARRETT,
Notary Public in and for
Cerro Gordo County, Iowa.

[fol. 225] (Order Directing that Depositions of George E. Preuss, et al., Be Not Taken Until Court Has Ruled on Motions on File, etc.)

Be It Remembered that on this 25th day of January, 1940, the motion and application of the Iowa-Wisconsin Bridge Company for an order that depositions be not taken until further order of this court came on for hearing and the court having examined said application and being fully advised in the premises it is hereby

Ordered that the depositions of George E. Preuss, Edgar S. Gage and Lee J. Skoner shall not be taken until this court has ruled on the motions on file mentioned in said application and then only if this court rules that said depositions may be taken.

GEO. C. SCOTT,
United States District Judge.

Signed in Chambers at Sioux City, Iowa, January 25, 1940, for entry in the Eastern Division.

Filed in the District Court January 25, 1940.

[fol. 226] (Notice of Hearing of Motion For Order That Depositions Be Not Taken.)

To Casper Schenk, James R. Morford and H. W. Norman, attorneys for Phoenix Finance Corporation:

You and Each of You Are Hereby Notified that the defendant, Iowa-Wisconsin Bridge Company, has filed a motion in the above entitled cause, a copy of which is hereto attached and made a part hereof, and that said motion will come on for hearing and submission at Dubuque, Iowa, in the United States District Court Room on February 6th, 1940, or as soon thereafter as the same can be heard by the court.

F. A. ONTJES,
W. C. GREEN,
Attorneys for Defendant,
Iowa-Wisconsin Bridge Company.

We hereby accept service of the foregoing Notice and acknowledge receipt of copy of Motion thereto attached this 25th day of January, A. D., 1940.

JAMES R. MORFORD,
H. W. NORMAN,
CASPER SCHENK,
Attorneys for Phoenix Finance Corporation.

Filed in the District Court February 6, 1940.

[fol. 227] Motion For Order That Depositions Be Not Taken.

Comes now the defendant, Iowa-Wisconsin Bridge Company and shows to this Honorable Court that a notice was served by the Phoenix Finance Corporation on the 23rd day of January, 1940, for the taking of the depositions of George E. Preuss, Edgar S. Gage and Lee J. Skoner on February 29th, 1940, in Chicago, Illinois; that this defendant immediately prepared a motion for an order that said depositions be not taken and mailed the same to the Clerk of this Court for filing and that the same was filed on the

forenoon of January 24th, 1940, and that this defendant also on the 23rd day of January mailed to Casper Schenk, counsel for Phoenix Finance Corporation, four copies thereof, together with notice of time of hearing for acceptance of service; that service of said notice was accepted on the afternoon of the 24th day of January, 1940; and the said Phoenix Finance Corporation in the afternoon of said day served another notice for the taking of the same depositions at the same place on January 29th, 1940, at ten o'clock A. M.

The defendant, Iowa-Wisconsin Bridge Company, makes the same motion with respect to said last notice and moves the Court for an order that said depositions be not taken for all the reasons set forth in the motion heretofore filed with respect to the first notice, which motion is hereby made a part hereof.

F. A. ONTJES,
W. C. GREEN,
Attorneys for Iowa-Wisconsin Bridge Company.

[fol. 228] State of Iowa,
Cerro Gordo County.—ss.:

I, F. A. Ontjes, being first duly sworn on oath depose and say that I have read the statements contained in the foregoing motion and that the statements therein contained are true as I verily believe.

F. A. ONTJES.

Subscribed and sworn to before me by the said F. A. Ontjes this 24th day of January, A. D., 1940.

(Seal)

F. T. BARRETT,
Notary Public in and for Cerro Gordo County, Iowa.

[fol. 229] (Hearing on Motion of Iowa-Wisconsin Bridge Company Asking That Depositions of Certain Witnesses Be Not Taken.)

Hearing had in Chambers, at Federal Building, Dubuque, Iowa, Tuesday, February 6, 1940, at 9:15 A. M.

Hon. Geo. C. Scott, Judge, Presiding.

Appearances:

Mr. Caspar Schenk, Attorney, Des Moines, Iowa, on behalf of Phoenix Finance Corporation.

Mr. F. A. Ontjes, Attorney, Mason City, Iowa, on behalf of Iowa-Wisconsin Bridge Company.

CARL V. RILEY,
Court Reporter,
Dubuque, Iowa.

[fol. 230] Carl V. Riley, Certified Shorthand Reporter, under the laws of the State of Iowa, resident of Dubuque, Dubuque County, Iowa, was first duly sworn by the Court to take down and transcribe, fully and correctly, all proceedings had on said matter before the court.

The Court: Let the record show that court is in session, and the matter before the court is the several motions filed by the Iowa Wisconsin Bridge Company—the first, a motion to strike Phoenix Finance Corporation's notice of intention to take depositions and for an Order that the depositions of specified parties be not taken, filed January 24, 1940; and another motion filed, January 25th, being a similar motion. They are both assigned for today, and you may proceed with the submission.

Mr. Ontjes: If Your Honor Please: We were first served with Notice of Intention to Take Depositions in this matter about the 28th day of December, 1939. Subsequently, on the 23rd day of January, 1940, we were served with notice by the Phoenix Finance Corporation for the taking of depositions of three named witnesses: One Preuss, one Gage, and one Skoner. We filed, on the 24th day of January, 1940, under the Rules of Civil Procedure, a motion that those depositions be not taken, first, that the time for taking depositions had expired, and, second, [fol. 231] that the persons, whose depositions were sought to be taken, were not in a position to give relevant, material, or competent evidence on the issues to be tried on the question of permanent injunction.

The first notice was to take depositions on the 29th day of February, 1940, and the Phoenix Finance Corporation served us on the 24th day of January, 1940, with another

Notice to take the same depositions on the 29th day of January, 1940, of the same persons, so we filed a further motion, making the same motion to the last Notice that we had made to the taking of the depositions under the first notice, that the depositions of the witnesses named be not taken.

Since that time they have filed a Resistance to that in which they recite that these three (3) named witnesses are Accountants, and that they have examined certain records, and so forth, with respect to matters involved in the bridge case, and that they propose to testify to certain alleged accounting done by them.

We contend, Your Honor, that all of such matters have been fully and completely adjudicated by this Court on the hearing in the original case, and that none of those witnesses are in any position to give any testimony, relevant, material, and competent; and the only competent evidence in this case is what was involved in the case before Your Honor, and what is sought to be litigated in the case in Delaware.

[fol. 232] Mr. Schenk: If the Court Please: The Resistance filed by the Phoenix Finance Corporation itself fully presents our position with respect to Mr. Ontjes motion.

The witnesses, whose testimony is referred to in the schedules, under our Resistance, we can assure the Court would testify as we have set them forth as set forth in those Schedules, and we should like to have the Court consider the Schedules of testimony and the Exhibits referred to therein, including the statement and report of Ernst and Ernst, as a definite and formal tender of testimony.

In support of the Resistance to Mr. Ontjes' Motion, I think nothing that I could say would add to what appears in our Resistance, with the Schedules relating to testimony, and the references to Exhibits and the reports of Auditor, attached thereto.

We ask that the Court will take these as a tender of what we expect to show if these depositions are permitted to be taken.

The Court: As I understand Counsel and the Resistance, including the tender, there is an offer to prove by these Accountants, Chicago persons, matters bearing upon the issues that were presented and tried in the original trial of the case some years ago, and this upon the theory that the Phoenix Finance Corporation was not such a party to that case that it is bound by the decree entered therein and affirmed by the Court of Appeals. Is my as- [fol. 233] sumption correct?

Mr. Schenk: Not entirely. Our position is that the former decree did not preclude the Phoenix Finance Corporation in respect to the actions now sought to be joined, which have been brought in the State of Delaware.

The Court: I may confine my statement to those items because really those are the only items in issue in this Supplemental Complaint.

Mr. Schenk: May I add to my statement, "Nor was there an Adjudication cancelling the $50,000.00 mortgage referred to in the Supplemental and Ancillary Bill.

The Court: Yes, I think I understand Counsel's contention.

The ruling of the Court will be that the only issues material to be considered in this Supplemental Complaint is the matter of the identity of the subjects presented for litigation in the Delaware suits described in the Supplemental Complaint with the items considered on the original trial, and which it was contended in that case by the Plaintiff entered into and were refunded by the issue of bonds aggregating $200,000.00, that the identity of those items must be determined by the record in the original trial, and the Court being of the opinion that the Phoenix Finance Corporation is in all respects bound by that decree because [fol. 234] of its presence on the record in that case, and because of its succession to the previous Corporation all of whose acts and conduct were shown to have been ratified by the Phoenix Finance Corporation. The ruling herein must be in favor of the two motions.

The motions will each be sustained, and an Order granted finding and directing that the depositions in question will

not be material, that the witnesses, whose testimony is noticed to be taken, are incompetent to contravene or overcome the record of the original trial.

Exceptions will be reserved to the Phoenix Finance Corporation, and an Order will be prepared and entered to that effect, and Counsel for the Phoenix will be forwarded a copy.

Mr. Schenk: Will Your Honor advise the Reporter as to filing a copy of the notes taken?

The Court: I will grant leave to file a transcript of the proceedings here this morning. A transcript of the proceedings here this morning may be made and filed, and made a part of the record. You will arrange for that, of course.

Mr. Schenk: Yes, sir. Thank you.

Mr. Ontjes: Has Your Honor the time to try this on the Permanent Injunction?

[fol. 235] The Court: I am anxious to have this matter disposed of as early as possible. However, I see no prospect of trying the matter before the latter part of March. I have a very involved Patent Case, which will within a few days be submitted. The briefs are now being filed. I have quite a number of other matters submitted within the last week, and some of them will require considerable study. I have also a matter that is not altogether pleasureable that I haven't heretofore had, and that is, to give attention to the matter of income tax, which will take considerable time between now and the 15th of March. As soon as I get a little more light on the work I will communicate with Counsel. If it is possible to try the case in March I shall be glad to do that. Let me ask you both, that inasmuch as the trial will be confined to matters in the old record, may not the trial be had at Sioux City?

Mr. Ontjes: Entirely satisfactory so far as we are concerned.

Mr. Schenk: I don't think it will make much difference, but I will have to consult my associates. The case will doubtless be tried by Mr. Morvard of Wilmington, Delaware.

The Court: It is simply a matter of a little more travel for him.

[fol. 236] Mr. Schenk: It wouldn't make any material difference that I can see.

The Court: It will save me two days.

Mr. Schenk: I think we can agree on that nicely.

Note: Mr. Ontjes inquired of the Court as to who should prepare the Order of Court with respect to this Motion, and the Court requested him (Mr. Ontjes) to prepare it, upon receipt of a copy of the Transcript of this hearing, which transcript was filed in the office of the Clerk of the United States District Court, For the Northern District of Iowa, Eastern Division, at Dubuque, Iowa, this 6th day of February, A. D. 1940, at 2.15 P. M.

[fol. 237] Certificate of Reporter

I, Carl V. Riley, upon my Oath depose and say that I am the same Carl V. Riley, who was sworn by the Court in the above entitled cause to take down in shorthand, and completely and accurately transcribe my said shorthand notes upon the hearing had in said cause this 6th day of February, A. D. 1940, at the Federal Building, Dubuque, Iowa, before the Hon. George C. Scott, Judge, United States District Court; and that the above and foregoing transcript of my said shorthand notes is such true, complete, and correct translation thereof.

CARL V. RILEY,

Subscribed and sworn to before me this 6th day of February, A. D. 1940.

Deputy Clerk
HAROLD N. HILBERT,
(Seal) Clerk, District Court,
Dubuque County, Iowa.

Filed in the District Court February 6, 1940.

[fol. 238] (Resistance of Phoenix Finance Corporation to Motions for Order that Depositions of George E. Preuss, et al., be not Taken, etc.)

Now comes Phoenix Finance Corporation, impleaded as a party complainant by order of Court in the above stated cause, and defendant in the Supplemental and Ancillary Bill of Complaint filed by Iowa-Wisconsin Bridge Company, the original defendant in said cause and the complainant in said Supplemental and Ancillary Bill of Complaint, and resists the following motions of Iowa-Wisconsin Bridge Company heretofore filed in the above stated cause:

[fol. 239] First: Motion verified January 23, 1940, wherein said Iowa-Wisconsin Bridge Company moves the Court as follows with respect to a notice of Phoenix Finance Corporation for the taking of the depositions of certain witnesses:

"(a) To strike from the files the notice of intention to take depositions filed by the Phoenix Finance Corporation.

"(b) To enter an order that the depositions of the parties therein specified shall not be taken.

"(c) To enter an order that the depositions of George E. Preuss, Edgar S. Gage and Lee J. Skoner, specified in the Phoenix Finance Corporation's notice to take depositions shall not be taken.

"(d) To set and to proceed with the hearing on permanent injunction."

Second: Motion verified January 24, 1940, wherein relief similar to that stated in Paragraph First above was sought with respect to the notice of Phoenix Finance Corporation for the taking of depositions of certain named witnesses in Chicago, Illinois, on January 29, 1940, at 10:00 o'clock A. M.

As grounds of resistance to the said motions Phoenix Finance Corporation says:

1. This cause has not been tried on its merits with respect to said Supplemental and Ancillary Bill of Complaint as amended of Iowa-Wisconsin Bridge Company and the Answer and Counterclaim of Phoenix Finance Corpora-

tion thereto. The time for taking depositions has not expired for the reason that pursuant to Rule 5 of the Rules of the United States District Court for the Northern District of Iowa, Phoenix Finance Corporation, within ten days after the pleadings were closed on said Supplemental and Ancillary Bill of Complaint as amended and said Answer and Counterclaim thereto, filed with the Clerk of this Court a statement of intention to take depositions for use [fol. 240] at the trial of this Cause, naming the witnesses and their addresses and stating the particular occasion for taking such testimony in such form, as by reference to said notice filed in this cause will more fully appear. Said depositions of witnesses on behalf of Phoenix Finance Corporation were also proposed to be taken pursuant to Rules 26, 28, and 30 of the Rules of Civil Procedure for the District Courts of the United States, wherein it is provided inter alia that the testimony of any person may be taken at the instance of any party, by deposition upon oral examination at any time after an answer has been served and without leave of Court.

2. Albert Penn is an officer and director of Phoenix Finance Corporation and resides at Goshen in the State of Indiana. John A. Thompson is a director, but not an officer, of Phoenix Finance Corporation and resides at St. Petersburg in the State of Florida. Neither of said witnesses is in the Northern District of Iowa or within a hundred miles of the place of the trial of this cause, or otherwise within the jurisdiction of this Honorable Court so as to be subject to the service of subpoena. Phoenix Finance Corporation has no assurance that said witnesses, or either of them, will be available to testify in person at the trial of this cause and desires to take their testimony by deposition as provided by the said rules of Civil Procedure, for use in the event said witnesses, or either of them, for any reason whatsoever, are not available in person at the trial. There is no statute or rule of Court requiring a party litigant to produce personally at the trial of a cause non-resident witnesses who are not subject to subpoena, or are otherwise inavailable, even though such witnesses are officers and/or directors of a corporate

party. There is no statute nor rule of court prohibiting, or [fol. 241] in any way limiting, the right of Phoenix Finance Corporation to take the deposition of said witnesses in this cause, and, on the contrary, the right to take such depositions is specifically provided by the Rules of Civil Procedure governing the practice in the District Courts of the United States. By the depositions of the said Albert Penn and John A. Thompson Phoenix Finance Corporation expects to prove as evidence in this cause on its behalf, the facts stated in the Schedules attached hereto and made parts hereof, entitled, "Testimony of Albert Penn", and "Testimony of John A. Thompson", respectively, and the said Albert Penn and John A. Thompson if called as witnesses in this cause would testify as shown by said Schedules.

3. George E. Preuss, Edgar S. Gage, and Lee J. Skoner are qualified and certified public accountants. Each of said persons at various times has examined the books and records either of Phoenix Finance Corporation or of Iowa-Wisconsin Bridge Company, or both, and has checked and verified said books and records with the original records of all banking institutions and other corporations with or through which each of said corporations from time to time transacted their financial affairs, for the purpose of ascertaining the indebtedness, if any, of Iowa-Wisconsin Bridge Company to Phoenix Finance Corporation, the extent thereof, how such indebtedness arose and the exact nature of all financial transactions between said corporations. Phoenix Finance Corporation denies that George E. Preuss, Edgar S. Gage, and Lee J. Skoner are not or that either of them is not, in a position to give competent, material and relevant evidence with respect to the issues in this cause. By the depositions of said witnesses, Phoenix Finance Corporation expects to prove the facts stated [fol. 242] in the schedules attached hereto and made parts hereof, entitled, "Testimony of George E. Preuss", "Testimony of Edgar S. Gage", and "Testimony of Lee J. Skoner", respectively, and said persons, if called as witnesses in this cause, would testify as shown by said respective schedules. In particular, the witnesses George E. Preuss and Lee J. Skoner will identify and prove as an exhibit on behalf of Phoenix Finance Corporation in this

cause, a certain Report of Special Examination of the accounts of Iowa-Wisconsin Bridge Company entitled, "Receipts and Disbursements, Iowa-Wisconsin Bridge Company—Lansing, Iowa, November 1, 1930, to September 25, 1933", as prepared by Ernst & Ernst, Accountants and Auditors, Continental Illinois Bank Building, Chicago, Illinois, (by which auditing firm the witnesses Preuss and Skoner are employed) under date of January 17, 1940, a signed original of which Report of Special Examination is filed with, and, by this reference thereto, made a part of this Resistance.

One of the issues in this cause, as such issue is defined by the Supplemental and Ancillary Bill of Complaint as amended, and by the Answer and Counterclaim of Phoenix Finance Corporation, is the good faith of Phoenix Finance Corporation in the institution of the various actions at law and in equity described in numbered Paragraph 7, of the Supplemental and Ancillary Bill of Complaint, whether or not the claims of Phoenix Finance Corporation with respect to said causes of action are or are not just and whether or not said causes of action were instituted for the purpose of harrassing, vexing, and annoying, and destroying the business of Iowa-Wisconsin Bridge Company, or whether the same were instituted for the bona [fol. 243] fide purpose of enforcing just claims and collecting just obligations. Phoenix Finance Corporation further says that among the principal issues in this cause as defined by the pleadings are the following, viz.: (1) whether or not this Court, sitting as a Court of Equity, will permit Iowa-Wisconsin Bridge Company to retain the benefits and advantages of loans and advances made to it and for its account by Phoenix Finance Corporation and to retain certain shares of stock transferred to it by Phoenix Finance Corporation for bonds which this Court by a prior decree has purported to invalidate, (2) whether or not Iowa-Wisconsin Bridge Company, in filing its said Supplemental and Ancillary Bill of Complaint, has done equity with respect to Phoenix Finance Corporation, and (3) whether Iowa-Wisconsin Bridge Company comes into this Court in this cause with clean hands.

4. Phoenix Finance Corporation denies that it is attempting to take the depositions of said witnesses with re-

spect to matters stricken by order of court from its Answer and Counterclaim and, on the contrary, avers that all of the evidence of each of said witnesses is material to the issues in this cause as defined by the pleadings. Phoenix Finance Corporation further denies that it is attempting to delay the hearing on the Supplemental and Ancillary Bill of Complaint, or that it is attempting in any manner to harrass or annoy the Iowa-Wisconsin Bridge Company. On the contrary, Phoenix Finance Corporation avers that it is proceeding with all expedition to have said cause tried on the merits thereof at the earliest opportunity and that, by the taking of said depositions and by the presentation of testimony and exhibits on its behalf, it is seeking only to [fol. 244] assert its rights and to protect its interests as a party defendant to said Supplemental and Ancillary Bill of Complaint.

5. For the reasons stated in Paragraph 1 above Phoenix Finance Corporation says the time for the taking of depositions mentioned in the notice has not expired and will not expire before said depositions can be taken.

6. Phoenix Finance Corporation prays that the Schedules of the proposed testimony of Albert Penn, John A. Thompson, George E. Preuss, Edgar S. Gage and Lee J. Skoner, with any exhibits thereto attached, and the Report of Special Examination by Ernst & Ernst, which said Schedules, Exhibits and Reports of Special Examination are referred to and made parts of this Resistance, be taken and considered as offers of evidence and exhibits in this cause on behalf of Phoenix Finance Corporation, to the same effect as though evidence and exhibits of like tenor and effect were offered at the trial; and that this Court shall rule upon the admissibility of said evidence and exhibits and every part thereof in conformity with the rules of evidence and the proper issues of this cause.

JAMES R. MORFORD,
HAROLD W. NORMAN,
CASPAR SCHENK,
Attorneys for Phoenix Finance Corporation.

[fol. 245] State of Delaware,
County of New Castle—ss.

I, James R. Morford, being first duly sworn on oath depose and say that I am one of the attorneys for Phoenix

Finance Corporation and have read the statements contained in the foregoing Resistance to Motions and know the contents thereof and that the statements therein contained are true as I verily believe.

JAMES R. MORFORD.

Subscribed and sworn to before me by the said James R. Morford, this 31st day of January A. D. 1940.

G. SELLERS SMITH,
Notary Public in and for
New Castle County.

(Seal)

[fol. 246] Schedule

Testimony of ALBERT PENN

Albert Penn is president of the Penn Electric Switch Company, Goshen, Indiana, and has been president of the Phoenix Finance Corporation, a Delaware corporation, since July 8, 1939, and director of said corporation since March 1932.

He was present in the directors' meeting from time to time when the financing of the Iowa-Wisconsin Bridge Company in connection with the construction of the Black Hawk Bridge was discussed and approved. He participated in authorizing the trustees to foreclose the mortgage deed of trust following default by the Bridge Company in payment of principal and interest on its bonds.

He participated in board meetings in which the adverse decision of the United States District Court was reported and discussed. It was understood that the validity of the mortgage lien had probably been adjudicated but that Phoenix Finance Corporation's interest in the indebtedness had not been presented in evidence in the case, was not within the issues thereof and had not been adjudicated against Phoenix. It was then decided by the Board that the cash loans to the Bridge Company of approximately $100,000 and over $50,000 interest thereon should be collected in courts having jurisdiction of the parties and of the causes. Thereupon James R. Morford, attorney, of Wilmington, Delaware, was authorized to institute the specific actions at law set forth in numbered paragraph 7 of

the Supplemental and Ancillary Bill of Complaint in this cause.

[fol. 247] The witness knew of his own knowledge that these large sums of money were owing to Phoenix Finance Corporation and that the actions authorized and commenced in Delaware were in good faith and not for the purpose of harrassing, vexing or annoying Iowa-Wisconsin Bridge Company. There is justly due to Phoenix Finance Corporation for loans to Iowa-Wisconsin Bridge Company a sum in excess of $150,000 (including interest). For the specific detail of this indebtedness and the exact amount thereof, reference is made to the Report of Special Examination (including schedules of all cash receipts and disbursements) of Iowa-Wisconsin Bridge Company, made by Ernst & Ernst, certified public accountants, dated January 17, 1940, filed as an exhibit with this Resistance.

The witness participated in the Phoenix board meeting which authorized Ernst & Ernst, certified public accountants to make a thorough examination of the accounts of the Bridge Company and of the Phoenix Finance Corporation and all related accounts, and to report and certify to Phoenix the result of such examination. The examination was made and a full and complete report was rendered as above stated. Upon the basis of the reported results of such special examination the witness, as president of Phoenix Finance Corporation, approved and authorized James R. Morford, attorney, of Wilmington, Delaware, to proceed with such legal actions as were necessary and advisable to recover said sums from Iowa-Wisconsin Bridge Company.

The witness will testify that there are no valid set-offs or counter-claims of Iowa-Wisconsin Bridge Company against Phoenix Finance Corporation with respect to the above-mentioned indebtedness.

[fol. 248] With respect to the loan by Phoenix Finance System Inc. to Iowa-Wisconsin Bridge Company in the sum of $50,000 on or about March 10, 1931 and the mortgage given to secure the same, and the further loan of $9,000 by Phoenix Finance System Inc. on or about November 10, 1931 to the Bridge Company to pay the lien of

Kremer & Hog, witness refers to a statement of the facts thereof as contained in the Schedule of the "Testimony of John A. Thompson", a part of this Resistance. Witness will testify to like effect.

With respect to the claim of Phoenix Finance Corporation for the return to it of 517 shares of Class "A" Bridge Company stock, the origin of the right of Phoenix in this matter and the absence of any valid adjudication heretofore with respect to said claim and demand, witness in like manner, refers to a statement of the facts thereof as contained in the Schedule of the "Testimony of John A. Thompson", a part of this Resistance. Witness will testify to like effect.

With respect to the $10,000 loan of Phoenix Finance System Inc. to the Bridge Company on or about September 24, 1931, the $11,262.71 of United States Treasury certificate sold by Phoenix Finance System Inc. to the Bridge Company on or about December 24, 1931 but for which payment was never made to Phoenix Finance System Inc., and the $17,735.19 cash loaned to the Bridge Company by Phoenix Finance Corporation during 1932 and 1933, as evidenced by four notes, witness in like manner refers to a statement of the facts in connection therewith as contained in the Schedule of the "Testimony of John A. Thompson", a part of this Resistance. Witness will testify to like effect.

[fol. 249] The witness participated in various conferences of officers and directors of Phoenix Finance Corporation at which ways and means of recovering said loans were discussed. As a result of such conferences it was decided that said $50,000 mortgage referred to above and in the Supplemental and Ancillary Bill of Complaint, should be recorded for the proper protection of Phoenix Finance Corporation against possible third party interests. Thereupon, said mortgage was recorded in the County of Crawford, State of Wisconsin, and in the County of Allamakee, State of Iowa. Said recordings were made in good faith, solely for the purpose of protecting the interests of the Phoenix Finance Corporation and without any intent to harass, vex or annoy the Iowa-Wisconsin Bridge Company, to becloud the title of said company, or to [interere] with

the rights of the United States Court or the Receiver thereof.

The witness was present as a proxy holder, representing the stock interests of Phoenix Finance Corporation, owners of about 25% of the voting capital stock of Iowa-Wisconsin Bridge Company, at a stockholders' meeting of the Bridge Company held at Lansing, Iowa, on July 8, 1939. He was present throughout the entire meeting and heard and understood all of the addresses and remarks of John A. Thompson at said meeting. A true and complete report of all statements made by John A. Thompson at said meeting with respect to any pending or contemplated litigation against the Bridge Company, as taken down and transcribed by Vernon L. Grant, Certified Shorthand Reporter, of Des Moines, Iowa, is attached hereto marked Exhibit "A" and made a part of this Statement. Witness [fol. 250] will corroborate and confirm the accuracy and completeness of said report.

[fol. 251] Exhibit "A"

Excerpts of record of proceedings of the Annual Meeting of Class "B" Stockholders of Iowa-Wisconsin Bridge Company held at the office of the Company, Lansing, Iowa, July 8, 1939, as reported by Vernon L. Grant, Certified Shorthand Reporter, 417 Court House, Des Moines, Iowa.

* * * * *

Mr. John A. Thompson: Mr. Chairman, In view of the fact that the outcome of this ballot will be viewed very carefully, or should be viewed very carefully by the record of those directors who are now seeking re-election, I think it is pertinent and important to review and answer some of the general accusations that have been made and to state just briefly some of the things that I know that every stockholder here is interested in reviewing. I don't mean to review it one sidedly, I mean general discussion from all sides.

You have had very little opportunity to know what the view of the Phoenix Company of the struggle of the past

six years has been and is now. I think for the reason that most of the present directors have been opposed to Phoenix and that therefore, necessarily, their actions in the future would be the same, that you should know before you vote for them or for anybody, what they stand for, particularly on the subject that I am now going to present to you.

[fol. 252] Mr. Ontjes has stated here and he stated in the December meeting, that the litigation between Phoenix and the Bridge Company was all over.

Now in the first place there never was any litigation between Phoenix and the Bridge Company. A great many of you folks think that it is a strange statement, because you have never heard it before. A great many of you don't realize that there never was a Phoenix witness or one bit of Phoenix evidence introduced in any record in connection with any of this litigation until June 15, 1939, in a case in Delaware. That case is not yet determined, so that it would be unwise for anyone to predict its outcome or to discuss the merits of that case.

But we can discuss some of the fundamental facts that underlie the litigation about which Mr. Ontjes has said was determined.

In the first place, you must understand that the litigation involved a mortgage, a mortgage deed of trust between this Bridge Company, of which we own one fourth of the stock, don't forget that part of it, and the Bechtel Trust Company of Devenport. The Bechtel Trust Company was the Trustee and the lawsuit was started by them as a foreclosure action. Now Mr. Ontjes, if you will please not interrupt, I will give you freedom of speech if you will not interrupt me.

Mr. Ontjes: All right, go ahead.

[fol. 253] Mr. Thompson: Mr. Ontjes will say to you that the Bechtel Company started the action at the instance of the Phoenix Finance Corporation. Now all of you who have had any experience with any kind of a corporation know that the only way a foreclosure action can be started by the trustee, is by assurance from some bondholder that the expenses will be guaranteed and the demand must be made

according to the terms of the trust deed before they can start foreclosure, notwithstanding it is their foreclosure, for the benefit of all the bondholders and they have no right under the sun to represent any bondholder except in matters that pertain to all the bondholders alike.

In other words, if there is a controversy that involves one set of bondholders and which may, by its very nature be adverse to the other bondholders, it is a matter the trustee cannot handle.

In this case, Mr. Ontjes will tell you that he thinks the trustee represented Phoenix in all of the charges of fraud that he made and I want to call your attention to the fact that he cannot point out, in the sixteen hundred pages of printed record in this case, one single instance wherein any witness ever said that there was any fraud in this case.

He has alleged fraud against an interlocking directorate, two boards of directors, who had some person in common. He has based his entire case upon the presumption that when you charge an interlocking directorate with fraud, that they are presumptively fraudulent and that without any further proof in the record, that fraud is presumed and will be found by the decree of the court.

[fol. 254] That is good law, but it is not a thing that is generally or commonly known by people, such as the people in this meeting. It is good law because when two groups of directors carry on any kind of an inter-company transaction, it is only fair and reasonable that they should come into court with clean hands and show that they were not dishonest. In other words, we revert to the old English law that says when you are charged, you are guilty.

Now in this case, they have never proved any fraud and I defy anyone to point to any place in this record, where any witness ever said there was anything fraudulent.

Phoenix at no point ever introduced any evidence as yet. We have tried for years to get evidence into the record, we have tried to get Ernst & Ernst, Certified Public Accountants on the stand, but we have never been able to. And they resisted. Why? Because they had us in a legal trap and they thought they could take advantage of us and beat

us out of the money that went into the building of this bridge.

Now I know that there is not a stockholder sitting in this room that is so dirty, so downright dishonest as to try to take advantage of anybody in that fashion if they knew the facts and I am not here to change your minds, I just want you to have opportunity to know the facts and if you don't use that opportunity, it is purely up to you.

Now in the Federal Court, the Phoenix Finance Corporation was very properly excluded from the introduction of evidence because it is a Delaware Corporation. You cannot bring two Delaware Corporations into Federal Court [fol. 255] with a controversy between those two companies and that is what Mr. Ontjes has tried to do here.

We are not blaming Judge Scott or the Federal Court that entered the decree against us, because the allegations in the case set up a charge of fraud and I will admit there was never any proof introduced in the record, because there was not in fact any evidence from us.

Now I don't want you people to be deceived into believing that there was fraud or that we are the only ones that are carrying on the litigation. I assure you very clearly that all we are trying to do is to recover the money we put in there. We are not in here to try to collect $50,000 in attorney fees for something we never put in and I submit to you that even if Mr. Ontjes and his group were successful in eliminating the mortgage against this bridge and it was entirely and forever eradicated, that that has nothing to do with the debt that still remains owing to Phoenix. They have eradicated the mortgage that was made to Bechtel Trust Company, but that is not eradicating the debt. That is owed for cash paid in by the Phoenix Finance Corporation.

Now if there was any fraud on the financial facts in this case, why do they resist the presentation of the Certified Public Accountant to the court or to this meeting, as they kept us here until eleven o'clock on December 6, when nearly one hundred people stayed here, sat in here and waited patiently hour after hour when they were trying to get a presentation of this matter to this body, merely be-

cause they didn't want these facts to be presented. I defy any of you to answer that particular point.

[fol. 256] Now this indebtedness can be properly presented and evidence can be put in down in the Delaware Court. That is now being done. There are six cases down there now that will be carried on through the courts in the next few months, the one I have just described was heard—it is all finished except the decision of the court, perhaps a brief due on the 13th and a decision of the court which they promise by the first of August and five others to follow.

Now my contention is now and always has been, that if a group of business men owning stock in this bridge company would sit down around the table with their own certified public accountants or any other men that has any knowledge of these things and would take the time to dig into it, they would never go to Delaware or any place else and spend good money to defend this kind of action.

Anyone can see, to give you an idea of how far this man is willing to go, representing you people to try to defraud the Phoenix Finance Corporation, I show you that in one instance there was 517 shares of preferred stock traded for bonds. At least that is his claim, that it was traded. Let it go at that. So he comes in and invalidates the bonds and says, "We are going to keep the stock; we are going to keep both the stock and the bonds." There is no charge that the 517 shares of stock were not paid for; there is no claim that the stock was not owned by the Phoenix Finance Corporation, but they say, "Because you are a crook, that we are going to keep both the stock and the bonds. We are not going to let you have either one of them."

[fol. 257] If we would go into court on that point, there is no doubt about what a court would do about that. There is not any question in the world as to what you people would decide. In fact, if I had a private deal with you and gave you $50,000 worth of stock for $50,000 worth of bonds and the bonds turned out to be worthless, naturally you would say "Here is the stock back." You wouldn't do that, even if you had such a legal trap by which you could defeat the 1087 stockholders of the Phoenix Finance Company that put this money in here.

Now the question is, are you going to support in this election, the kind of a director that will go out, buy this kind of fraud and misrepresentation; are you going to re-elect for the coming year again directors that will hire that man and support him, or are you going to try an honest bunch of directors on this board? (Applause)

[fol. 258] Schedule.

Testimony of JOHN A. THOMPSON.

He is a stockholder and director of Phoenix Finance Corporation but is not an officer thereof. He refers to the Schedule of the "Testimony of Albert Penn", a part of this Resistance, and will testify to like effect.

He was president of Iowa-Wisconsin Bridge Company at the time of all the transactions hereinafter mentioned. He had personal charge of the books of account thereof and is personally acquainted therewith. He is a qualified bookkeeper and understands accounting.

He has carefully examined the Report of Special Examination of the financial affairs of Iowa-Wisconsin Bridge Company, made by Ernst & Ernst, certified public accountants, under date of January 17, 1940, an exhibit to this Resistance, and the same in all respects accurately and truly reflects the accounts and transactions of Iowa-Wisconsin Bridge Company as the same appear in its books of account and as the same are substantiated and verified by the original records of all banking institutions with or through which said corporation at the times therein mentioned transacted its business, and by the books of account and records of the several persons, firms and corporations referred to in said Report of Special Examination.

The cause of action referred to in paragraph 7 (a) of the Supplemental and Ancillary Bill of Complaint is based upon the indebtedness of Iowa-Wisconsin Bridge Company to Phoenix Finance Corporation because of cash [fol. 259] loaned and advanced, as shown by item of January 20, 1933 appearing on page 21 of the Cash Receipts of said Report of Special Examination, and further appearing

under the same date on Schedule D of said Report. A part of said transaction is [furthere] evidenced by item under date of December 15, 1932, appearing on page 20 of the Cash Receipts Schedule of said Report and item of the same date on Schedule D thereof.

Said cause of action last above referred to has been tried on its merits before the Judges of the Superior Court of the State of Delaware, in and for New Castle County. Iowa-Wisconsin Bridge Company appeared in said cause generally and pleaded to the plaintiff's declaration. Among other pleas so filed by Iowa-Wisconsin Bridge Company was the plea of res adjudicata based upon the decree of this court of December 1, 1936 and the purported effect thereof. After trial said case was argued and briefed by counsel for the respective parties and is now pending decision by said Superior Court.

The cause of action referred to in paragraph 7 (c) of the Supplemental and Ancillary Bill of Complaint, and the claims of Phoenix Finance Corporation with respect thereto, are identified by said Report of Special Examination on Schedule D thereof, by an item of $500 under date of December 31, 1932, on item of $12,110.19 under date of July 7, 1933, and upon the ledger account of the Phoenix Finance Corporation in the books of the Iowa-Wisconsin Bridge Company.

[fol. 260] Said cause of action last above mentioned is pending in the Superior Court of the State of Delaware, in and for New Castle County. Iowa-Wisconsin Bridge Company, the defendant, has appeared generally therein, has pleaded to plaintiff's declaration and among its said pleas is the plea of res adjudicata, based upon the decree of this court of December 1, 1936 and the purported effect thereof.

The cause of action stated in paragraph 7 (d) of the Supplemental and Ancillary Bill of Complaint, and the claims of Phoenix Finance Corporation with respect thereto, are identified by said Report of Special Examination, on Schedule C thereof, by a cash item of $10,000, under date of September 24, 1931, and the non-cash item (U. S. Treasury Certificates) in the sum of $11,262.71, under date of December 24, 1931. Said cash item of $10,000 also appears on

page 19 of the Schedule of Cash Receipts under date of September 24, 1931, and both of said items appear further on the ledger account of the Phoenix Finance Corporation, in the books of the Iowa-Wisconsin Bridge Company.

Said cause of action last above mentioned is pending in the Superior Court of the State of Delaware in and for New Castle County. Iowa-Wisconsin Bridge Company, the defendant, has appeared generally therein, has pleaded to plaintiff's declaration and among its said pleas is the plea of res adjudicata, based upon the decree of this court of December 1, 1936, and the purported effect thereof.

The cause of action referred to in paragraph 7 (e) of the Supplemental and Ancillary Bill of Complaint, is based [fol. 261] upon two $500 Series "B" Bonds of the Iowa-Wisconsin Bridge Company, not purchased from the Bridge Company by Phoenix, but acquired from innocent holders for value by the Phoenix Finance Corporation subsequent to the commencement of the foreclosure action. The validity of said bonds was not and could not have been adjudicated in this cause for the reason that the owner or owners thereof were not parties thereto or otherwise subject to the jurisdiction of the court.

Said cause of action last above mentioned is pending in the Superior Court of the State of Delaware, in and for New Castle County. Iowa-Wisconsin Bridge Company, the defendant, has appeared generally therein, has pleaded to plaintiff's declaration and among its said pleas is the plea of res adjudicata, based upon the decree of this court of December 1, 1936 and the purported effect thereof.

Witness will also testify with respect to a claim of Phoenix Finance Corporation in addition to the cash loans and advances above mentioned. This is the claim for the return to Phoenix Finance Corporation of 517 shares of Class "A" stock of the Bridge Company and is the subject matter of the cause of action in the Court of Chancery of the State of Delaware referred to in paragraph 7 (b) of the Supplemental and Ancillary Bill of Complaint in this cause. In this proceeding Phoenix Finance Corporation is seeking to recover said 517 shares of Bridge Company stock which was owned by it and exchanged for certain bonds of Iowa-

Wisconsin Bridge Company, which this court by its decree has purported to invalidate. The Bridge Company has refused to return said 517 shares to Phoenix Finance Corporation in spite of said purported invalidation.

[fol. 262] Witness will identify the obligations of the Bridge Company to Phoenix, secured by a $50,000 mortgage (referred to in the Supplemental and Ancillary Bill of Complaint) as appearing on said Report of Special Examination, by two items of March 10, 1931, the one in the sum of $35,000 and the other in the sum of $15,000, as the same appear on page 7 of Schedule C of said Report, and on page 15 of the Schedule of Cash Receipts of said Report, under date of March 10, 1931.

He will testify with respect to the giving of said mortgage to Phoenix Finance System Inc. by the Bridge Company to secure said advances and the later conditional exchange of this mortgage for bonds of the Bridge Company that were a part of $97,000 worth of bonds issued on March 15, 1932 and purportedly invalidated by decree of this court. He will prove an agreement between the Bridge Company and Phoenix upon the conditions of which said mortgage was exchanged for bonds. He will establish by such testimony and proof, that, upon the invalidation of said bonds, the mortgage reverted to its original status as security for valid and subsisting obligations of Bridge Company to Phoenix Finance Corporation as successor in interest to Phoenix Finance System Inc., including the obligations above mentioned and the further advance or loan hereinafter referred to.

He will also testify with respect to a further loan of $9,000 by Phoenix Finance System Inc. to the Bridge Company on or about November 10, 1931 for the purpose of paying and satisfying a mechanic's lien under Iowa law upon the property of the Bridge Company in favor of Kremer & Hog, contractors. Said loan will be identified by him on said Report of Special Examination on page 19 [fol. 263] of the Schedule of Cash Receipts under date of November 11, 1931 and on Schedule C of said Report (page 7) under date of November 10, 1931. Witness, by his testimony, will refer to the terms and conditions of said $50,000 mortgage of record as an exhibit in this cause, with respect

to the [extention] of the lien thereof to cover future advances of the character above mentioned, and by his testimony will establish that the covenants of the Bridge Company in this respect have never been adjudicated or held invalid in this cause and thereby will establish that the granting of the prayers of the Supplemental and Ancillary Bill (in this particular) would, in effect, deprive Phoenix Finance Corporation of its property and property rights without due process of law.

True and correct copies of the letters of November 23, 1938 and June 12, 1939, referred to in paragraph 10 of the Supplemental and Ancillary Bill of Complaint are attached hereto, marked Exhibits "A" and "B" respectively, and will be identified as having been written by this witness to the addressees therein named.

The June 12, 1939 letter was a reply and part of an exchange of correspondence between Mr. Fred Bierman and the witness in an effort to arrive at a method of combatting the attempt of Mr. Ontjes to collect $50,000 or more of attorney's fees from the Bridge Company for services which were regarded by some of the stockholders as of no value, but of considerable detriment and irreparable damage to the Bridge Company, if in the end the true and hon- [fol. 264] est debts of the Bridge Company to Phoenix Finance Corporation must finally be paid. Witness regarded this correspondence as being the rightful privilege of one stockholder to address and discuss with another stockholder the affairs of a corporation in which they had an interest. This letter was also intended to promote a program for the appointment of an impartial and qualified committee to examine into the financial condition and debts of the Bridge Company and to recommend only such legal procedure as could not be avoided by a peaceful conference between this committee and the creditors of the Bridge Company.

The letter of November 23, 1938 was addressed by the witness for and on behalf of the large stock interest of Phoenix in the Bridge Company to other stockholders, for the purpose of bringing to their attention the matters to be discussed and voted upon at the annual stockholders' meeting to be held on December 6, 1938, and to point out to the

stockholders the inequality of distribution of directors, which at that time gave almost the entire board to an Ontjes' controlled group and denying representation on the board to the holder of the largest investment in the company. The witness considered that any stockholder had the privilege to address his fellow stockholders on important subjects of this nature to be brought up in an annual meeting of stockholders.

Witness will, by his testimony, deny that all matters and differences between the Bridge Company and Phoenix Finance Corporation and Phoenix Finance System Inc. were fully settled, adjudicated and determined by the decree of this Court and the Circuit Court of Appeals and while the questions as to the construction and effect of [fol. 265] said decrees, the scope of the issues of the cause and the status of the parties, is a matter of law rather than of fact, the witness will, in his testimony, refer particularly to the claim of Phoenix Finance Corporation against the Bridge Company for the value of $5000 worth of bridge toll tickets which claim is the subject of the litigation in the Superior Court of Delaware referred to in paragraph 7 (f) of the Supplemental and Ancillary Bill of Complaint. Witness by way of further denial of this allegation of the Supplemental and Ancillary Bill of Complaint in this respect will, in his testimony, refer to the claim of Phoenix for the return of said 517 shares of Bridge Company stock, above referred to, and mentioned in paragraph 7 (b) of said Supplemental and Ancillary Bill.

Witness will, by his testimony, deny that the 517 shares of Bridge Company stock above mentioned were surrendered to Bridge Company and cancelled, but of his own knowledge will testify that the same were transferred to the name of Bridge Company and were and still are carried on the books of Bridge Company as Treasury stock.

Witness will deny that he made an assertion on or about December 6, 1938 as alleged in paragraph 9 of the Supplemental and Ancillary Bill of Complaint.

Witness will further testify that Phoenix Finance Corporation is the successor in interest to Phoenix Finance

System Inc. and that any and all claims of Phoenix Finance System Inc. mentioned in this statement or in the statement of Albert Penn are now the claims and property of Phoenix Finance Corporation.

[fol. 266] Exhibit A.

To Stockholders of
Iowa Wisconsin Bridge Co.
Lansing, Iowa

November 23, 1938

Fellow Stockholder:

You must attend the stockholders meeting at Lansing, Tuesday, December 6th at 1:30 P. M. if at all possible. It is important for the protection of your stock investment that an honest and representative group of real business men be elected to manage the affairs of the Bridge Company.

Although I will vote over 800 shares, I will not be a candidate under any circumstances.

The Irene Bell-Ontjes group will undoubtedly try to elect their present members, namely: Tom Bakewell of Lansing, H. G. Foote of Minneapolis, F. D. Kendrick and George Dittman of St. Paul, H. A. Schremser and Fred Bierman of Decorah, and Irene Bell of Mason City, for their new slate, and Fred Ontjes of Mason City for general counsel.

Most of you know Tom Bakewell, with his $265. investment, well enough to know that he is not the choice of the large list of investors in Alamakee County, representing $143,500. Mr. Foote, I think, fairly represents the Minneapolis group and he has a large investment. Kendrick and Dittman both have large investments, and it is my personal opinion that they, as well as Mr. Foote, are honest and reliable insofar as they have any knowledge of the affairs of the Bridge Company. However, the total investment in that Minneapolis-St. Paul territory is $87,600, which would scarcely rate one full director, and certainly does not justify three directors.

[fol. 267] Schremser and Bierman of Decorah may or may not represent a fair choice of the $68,800 invested in that community. Schremser has three shares and his wife also has three shares. Bierman is able and honest, but he has only one share, so it would seem that their desire to have the job of directorship could hardly be justified simply to protect such a small investment. A man with real money in this bridge should be chosen from the Decorah territory, and you have five large investors in Decorah to choose from: H. S. Smith, William Hilleman, G. O. Quelley, John H. Johnson, and the Annundsen interests. I don't know them personally, but I understand they are all reliable.

The Mason City community has less than three per cent of the total outstanding stock, which ordinarily would not entitled them to a director.

It does not take a very smart stockholder to know why Lawyer Ontjes of Mason City is fighting for control of the bridge and its cash toll income, nor why he resorts to the reprehensible trick of giving gullible stockholders one dollar in cash to sign a long written contract.

Southern Minnesota has about five times as much stock as the Mason City territory. It should have representation. Neither is there any representation for Fayette County with $13,100 investment, or for Osago, Cresco, Bellevue, and Dubuque, totaling $31,700, nor for the Wisconsin investments of about $15,000.

You will, of course, agree that high grade men should be chosen from among the large investors and from communities in which large sums are invested in the bridge, because they have a real reason to vote right; and particular-[fol. 268] iy good representation, at least two directors, should be given to Alamakee County with $143,500 invested in the bridge; and the best choice of one for the Decorah community with $68,800. The Lansing-Decorah section is where the largest number of stockholders reside and directors chosen from that community would be ever present and available for directors meetings, right there where the bridge is situated and where the problems of the Board arise.

A great many of you people purchased your stock after Phoenix brought large sums of money into the picture to buy steel and finance the young struggling Bridge Company so that a bridge could finally be completed. At that time a large number of your stockholders were very highly pleased to have me at the head of your company as president, so that I could bring this money in and save the project. A large number of you stockholders still remember those things, and have unshakeable confidence in my honesty and integrity. Others have allowed selfish and dishonest promoters to destroy that confidence and without hearing my side of the story. That, of course, is the privilege of every stockholder, but it is hardly fair, as you will grant. I think at least 90% of the bridge stockholders are fundamentally honest and intend to be fair at all times, and would not knowingly join a gang of conspirators to cheat anybody out of honest debts, nor would they refuse to hear the other man's side of the case, and spend money fighting to kep his evidence out of the record.

I am not asking you or any other man to help me or to help Phoenix; Phoenix doesn't need any help in its right [fol. 269] to maintain its creditor's position. In the end the facts will all be proved in competent courts, and I am not a bit disturbed about the final outcome, but as stockholders we need the same help that you need, and that is the help of each other to fight for a conservative, intelligent, and above all things, honest, and representative Board of Directors and that does not mean directors favorable to my side, or anybody's side, just honest men.

For instance, if F. D. Kendrick will stand for re-election, I will vote a large block of stock for him, not because he is my friend, but because he is honest and intelligent. In fact, as you know, he has been one of the principal interveners fighting Phoenix, but it is my belief that no dishonesty was added to the fight with his knowledge and permission. I think many other very honest and honorable stockholders may be opposed to Phoenix with all the sincerity in the world, but so long as they are honest and use their intelligence, they will have our vote as well as yours.

It is extremely important that you attend this December 6th meeting, and learn all the facts, but whether you

attend or not, you should immediately fill out and mail the enclosed proxy in the enclosed stamped envelope addressed to the Bridge Company. Don't fill in my name, because I don't want it. If you do not know of anyone who is going to attend the meeting, I suggest a dozen or more names of thoroughly honest stockholders who are almost sure to attend.

George Aschom, Walter Aschom, H. W. Gaunitz, J. H. Thompson, M. Kerndt, J. W. Dempsey, D. F. Wolfe, M. A. Dunlevy, F. J. Nachtvey, P. E. Rethwisch, all of Lansing, Iowa, and G. B. Richter, H. T. Wagner, George Huntley, Frank T. Hartman, and F. D. Kendrick.

[fol. 270] I am sure any of these gentlemen would vote your stock for honest and able directors. So if you don't know anyone who is going to attend the meeting, you should choose one or more, preferably two, of the above names, fill them in the proxy blank enclosed herewith, sign it, and have a witness sign and mail it. Also fill out the information on the enclosed post card, and mail both of them immediately while the matter is on your mind.

Sincerely yours,

J. A. THOMPSON.

JAT:jb

[fol. 271] Exhibit B

June 12, 1939.

Mr. Fred Biermann
Decorah, Iowa

Dear Mr. Biermann:

I wish to thank you for your letter of June 8, and I especially appreciate your determined stand against the approval of any exorbitant lawyers' fees.

Of course, the amounts we paid our attorneys in this Bridge litigation really has little value in trying to determine an equitable fee for defense counsel, because the entire burden and at least ninety per cent of the work was on our side of the table after the disastrous Master's report was filed. However, these fees in total were never

any substantial portion of the $50,000, and the mere suggestion of any such sum by any counsel on our side would have resulted in immediate dismissal. The fees involved prior to our efforts to obtain a re-hearing or opportunity to put in Phoenix evidence, in other words for everything up to the decision of the case by the Master, which was the only part involving any extensive work on the part of defendants, was less than $5000 for all parties concerned on our side of the case and for the fees for the attorneys for the trustees.

Of course, you realize that any argument from me concerning the amount of attorneys' fees to be paid to the attorney who has caused us so much trouble would be generally regarded as prejudiced, but I think I have the ability to deal with such matters without prejudice, exactly [fol. 272] as I think you have that ability; and speaking frankly, Mr. Biermann, and totally disregarding all prejudice and disregarding the relations of the parties in this case, it is my honest opinion; first, that Mr. Ontjes has done the Bridge Company no service whatsoever, but has actually caused it a very severe damage; and secondly, even if everything he has pleaded was true, and even if the matter were permanently settled, and there was no danger that the Bridge Company would ever be shown in another court as owing all of this money, in other words, if it were a complete and honest victory, defeating the claims of fraudulent creditors to the extent of $175,000 (not $185,000 as they claim), then, and in that case, certainly a fee of $50,000 would be unmentionably high, and in any case would simply mean that the lawyers would take the Bridge for their services to the Bridge Company to prevent somebody else from taking it as the Bridge Company has no $50,000 and no possible way of obtaining it.

However, further reducing this so called $185,000 saving, in order to get this case right down to earth, keep these facts in mind: That the court allowed the Bradshaw claim of $4,000 which eliminated $10,000 bonds as collateral. He allowed $6,000 to Helmer Anderson which eliminated $7400 of bonds, and he allowed five other claims of $1000 each which eliminated $5000 worth of bonds. Simple addition shows this to be $22,400 worth

of bonds eliminated, and the total bond issue was only $200,000, so you can readily see the dishonesty of claiming the elimination of $185,000 worth of bonds claimed by Phoenix.

[fol. 273] Now Phoenix claimed outright ownership of $97,000 and $60,500 or a total of $157,500 of Bridge bonds. The $60,500 were bonds received in connection with the retirement of 517 shares of preferred stock which was unquestionably owned and paid for by Phoenix, so if the bonds were no good, certainly the Bridge Company must return the 517 shares of preferred stock to Phoenix. A suit is now pending in Delaware to enforce the Bridge Company to do that which it should in fairness and honesty do without a law suit, and there is not the slightest doubt that the Delaware courts will make the Bridge Company make good on the $60,500 bonds or return the 517 shares of preferred stock. So while this law suit may have resulted in the elimination of the $60,500 of bonds as a bonded debt, that was not a gain of $60,500 to the Bridge Company by any means.

As to the $97,000 worth of bonds, even if the mortgage deed of trust has been adjudicated and eliminated, and it is still shown that the Bridge Company owes the $97,000 for legitimate borrowings, it makes little difference whether the Bridge Company pays the debt by reason of a mortgage foreclosure or by way of a judgment and execution against the Bridge.

We have to this point accounted for $22,400 of bonds in the hands of third parties, eliminated by legitimate retirement of the full amount owing thereon, and $157,500 worth of bonds, the collection of which has been temporarily stayed, making a total of $179,900 and leaving $20,100 yet to be accounted for.

These $20,100 of bonds were pledged as collateral against Bridge Company notes for borrowed money, totaling $17,735.19.

[fol. 274] Suits are now pending on these notes in the Delaware courts, and there is not the slightest chance that they will not be collected, because here Phoenix will have opportunity to present its evidence, which was never done

in any of the proceedings in Federal Court, and could not properly be done because Phoenix and the Bridge Company, both being Delaware corporations, could not carry on as proper parties with adverse interests in a Federal Court proceeding, as you well know.

Now I am not giving you all of these facts for the purpose of causing you to do anything about this situation, but entirely for the purpose of acquainting you first hand with facts which have never been previously made known in a general way to the stockholders, and because you happen to be a very good and personal friend of a couple of other very high grade gentlemen who are two of the closest and most highly regarded friends I have on this earth. They have told me of your fine character, and I have become convinced that you are just too fine a man to carry on and support an inconsistent and unfair position against another large group of stockholders who furnished the real money to build your Bridge. I am just as sure as anything in the world that you intend to be fair and that you and I could sit down across a conference table with all of the facts in hand, and we would arrive at exactly the same conclusion, and there would not be ten cents between us, that is, of course, if we both had the same set of facts, and I mean all of the facts.

Regardless of whether you ever do anything about this matter from an official standpoint, I want you to be personally acquainted with all of the facts, because I don't [fol. 275] want you or any man of your caliber and high character to carry around any wrong impression about me.

What would you think of the suggestion that we sit down across a conference table and digest this entire situation at some near future date?

Sincerely yours,

JOHN A. THOMPSON.

JAT:jb

[fol. 276] Schedule.

Testimony of George E. Preuss

He is a Certified Public Accountant and Supervisor in the Chicago Branch of Ernst & Ernst, Certified Public Accountants.

He assisted in the examination described in the Schedule of "Testimony of Lee J. Skoner", participated in the preparation and checked completely the Report of Special Examination of Ernst & Ernst to which reference is made in the Schedule of the "Testimony of Lee J. Skoner", and which is attached as a part of the Resistance in this cause.

He will testify that said Report is in all respects true, and complete and accurate and that the same correctly and fully reveals all financial transactions between Iowa-Wisconsin Bridge Company and Phoenix Finance Corporation and its predecessors in interest. With respect to the method of investigation and examination upon the basis of which said Report was prepared, the witness affirms and corroborates the statements contained in the Schedule of the "Testimony of Lee J. Skoner" and will testify to like effect.

[fol. 277] Schedule.

Testimony of Edgar S. Gage.

The witness is a Certified Public Accountant with offices at 332 So. La Salle St., Chicago, Ill.

The witness was employed by the Bell, Schremser, and Cress stockholders' committee of Iowa-Wisconsin Bridge Company and worked with and under the instruction of Fred A. Ontjes, Esq., on behalf of the interveners in this cause, during January and February, 1934, in a special examination of the books and records of the Iowa-Wisconsin Bridge Company and other corporations and concerns which the Bridge Company had had transactions in connection with the construction of the Black Hawk bridge. The witness made a report of said examination to Mr. Ontjes on the 2nd day of April, 1934, and from time to time discussed the affairs of the Bridge Company and the result of his examinations with said Ontjes. The witness particularly informed Mr. Ontjes of the following items of indebtedness of the Bridge Company to the predecessor in interest of Phoenix Finance Corporation, viz., (1) $50,000 borrowed by the Bridge Company March 10, 1931, (2) $10,000 borrowed by the Bridge Company September 24, 1931, (3) $9,000 borrowed by the Bridge Company Novem-

ber 10, 1932, (4) the purchase on account by the Bridge Company of U. S. Treasury Certificates in the sum of $11,-262.71 on December 24, 1931, and (5) the cash sums of $1,000, $2,000, $3,125, $500, and $12,110.19 borrowed by the Bridge Company from Phoenix Finance Corporation between December 20, 1932, and July 7, 1933. Witness will [fol. 278] testify that the records of the Bridge Company showed no repayment of said items of indebtedness or any part thereof and that he so advised Mr. Ontjes.

The witness appeared at the hearing of this cause before the Master on July 15, 1935, at the request of Mr. Ontjes and previous to the hour of the hearing he met with Mr. Ontjes, discussed the testimony that should be given and understood that he would be interrogated with respect to the items above mentioned. He will testify that at said hearing Mr. Ontjes withheld a large part of the material witness had assembled and that he was interrogated only with respect to a small part thereof, which part was in itself insufficient to establish conclusively the validity of the items of indebtedness above mentioned, although conclusive proof of the same was available in the data witness had then available and of which the said Ontjes had full knowledge and information.

Witness will testify that he was dismissed without being permitted to give any substantial testimony concerning the financial condition of the Bridge Company or its indebtedness to Phoenix. Prior to the testimony witness had prepared in longhand and had given to Mr. Ontjes a financial statement showing the financial condition of the Iowa-Wisconsin Bridge Company as of December 31, 1931, including the items of indebtedness to Phoenix above mentioned, and while on the witness stand Mr. Ontjes handed him what was purported to be a typewritten copy of said longhand financial statement. Upon interrogation by Mr. Ontjes, the witness testified, without careful scrutiny or further comparison with the books of the company, or with his [fol. 279] original longhand statement, and upon the assumption that Mr. Ontjes had had prepared a true typewritten copy thereof, that said typewritten statement was a true and correct financial statement of the Iowa-Wisconsin Bridge Company as of December 31, 1931, not knowing

at the time that the liabilities shown on said typewritten statement which was introduced, admitted as Exhibit B-26 H. E. B. in this cause, was incomplete, in that certain liabilities, represented by items of indebtedness of the Bridge Company to Phoenix had been, inadvertently or by design, omitted by the person responsible for the preparation of said typewritten copy.

Witness will testify that a year or more later, the falsity of said Exhibit B-26 H. E. B. was called to his attention, whereupon he made an affidavit at the request of W. B. Sloan, Esq., attorney for Phoenix Finance Corporation, dated January 25, 1937, which affidavit appears as a part of the petition for rehearing of the Phoenix Finance Corporation filed in this cause on or about the 29th day of January, 1937; that to this affidavit was attached the original of witness's longhand financial statements above mentioned, and a copy of Exhibit H-26 H. E. B. for comparison therewith; and that the facts surrounding the discrepancies between the longhand and typewritten copies were set out in said affidavit. The witness repeats and reaffirms all of the facts set forth in said affidavit and will testify to like effect.

The witness will further testify that he was employed by Phoenix Finance Corporation to make a further examination and investigation of the actual bank statements and records of the banks with which the Iowa-Wisconsin Bridge [fol. 280] Company had maintained checking accounts subsequent to November 1, 1930, to examine the books and records of various firms and corporations with which the Bridge Company had done business and carried accounts during the course of the construction of the Black Hawk Bridge, and to report and certify to Phoenix Finance Corporation the results of such examination, with particular reference to the indebtedness of the Bridge Company to Phoenix. He will testify that he found it to be a fact, and so reported to Phoenix, that Phoenix and its predecessors in interest had advanced in cash to the Bridge Company the total sum of $318,141.85, and that there had been repaid by the Bridge Company to Phoenix, $213,402.87 in cash, leaving a balance of $104,738.98 due to Phoenix by the Bridge Company against which were net non-cash credits

of $6,389.52, leaving a net balance (exclusive of interest and any stock and toll ticket investments) of $98,394.96. The witness compared the accounts of the Bridge Company with the companion accounts of other firms and corporations to which and from which these cash funds were paid and received, and found them in agreement and conformity with the books of the Bridge Company. The witness examined a copy of the Report of Special Examination of the Cash receipts and disbursements and other financial transactions of the Bridge Company, as made and certified by Ernst & Ernst as of January 17, 1940, with his own work sheets and the books and records of the Bridge Company and found and reported to Phoenix that said Report of Ernst & Ernst is in substantial conformity in all material details with the findings and report of the witness. The [fol. 281] Report of Ernst & Ernst herein referred to is the Report filed as an Exhibit to this Resistance and the witness will so testify.

[fol. 282] Schedule.

Testimony of Lee J. Skoner.

He is a Certified Public Accountant and Assistant Manager of the Chicago Branch of Ernst & Ernst, Certified Public Accountants.

He will testify that the firm of Ernst & Ernst were employed by Phoenix Finance Corporation in January, 1937, to make a special examination, investigation and report of the financial affairs of the Iowa-Wisconsin Bridge Company, subsequent to November 1, 1930.

He will testify that he was placed in charge of such investigation and examination; that he and other certified public accountants in the employ of Ernst & Ernst and under his supervision made a thorough examination of the actual and original books and records of the Bridge Company and of John W. Shaffer Company, Standard Shares Holding Company, Thompson & Company, Phoenix Finance System, Inc. and Phoenix Finance Corporation, as to all of the transactions between the Bridge Company and said companies; and that he and the such other certified public accountants working under his supervision, examined the

original cancelled checks representing all of the cash disbursements by check referred to in the Report (excepting only checks for $1994.37), examined all of the original bank statements or original records of the banks upon which such checks were drawn or in which the same were deposited and all of the cash deposits and withdrawals recorded in said books of the Bridge Company.

[fol. 283] He will testify that he made, or caused to be made and executed a Report of Special Examination, including the cash receipts and disbursements of the Iowa-Wisconsin Bridge Company, from November 1, 1930 to September 25, 1933 (the latter date being the last business date prior to the appointment of the receiver in this cause), said Report being dated January 17, 1940. Said Report is referred to in the Resistance of which this Schedule is a part, and is filed therewith as an Exhibit. This Report the witness will identify and prove as a true, accurate and complete statement and summary of all of the transactions of the Iowa-Wisconsin Bridge Company for said period.

(As identified and proved by the witness, the Report of Special Examination of the accounts of Iowa-Wisconsin Bridge Company entitled "Receipts and Disbursements, Iowa-Wisconsin Bridge Company, Lansing, Iowa, November 1, 1930 to September 25, 1933" will be offered in evidence as an Exhibit on behalf of Phoenix Finance Corporation and tender of the same is hereby made).

He will testify that he found it to be a fact, as the same is disclosed by said Report, that the Bridge Company received in cash from Phoenix (including Phoenix Finance Corporation and all predecessors in interest) $318,141.85, and repaid to Phoenix $213,402.87, leaving a cash indebtedness of the Bridge Company to Phoenix of $104,738.98, less net credits for non-cash items of $6,389.52, thereby leaving a balance of net cash justly due from the Bridge Company to Phoenix, exclusive of interest and exclusive of [fol. 284] other stock and toll ticket investments or claims, of $98,349.46. He will identify Schedule F of said Report as proving interest in the amount of $55,638.95 as justly due to Phoenix by Bridge Company upon the said net advances of $98,349.46.

He will testify that he advised Albert Penn, president of Phoenix Finance Corporation, and other officers and directors of the company, in August 1939, that the sums above stated constituted valid and subsisting demands and claims of Phoenix Finance Corporation against Iowa-Wisconsin Bridge Company and that, in his opinion as a certified public accountant, Phoenix Finance Corporation was entitled to recover the same by appropriate legal action. He will further testify that said Report of Special Examination does not include any claim or demand of Phoenix with respect to 517 shares of Bridge Company stock, not its claim based upon the value of $5000 worth of bridge toll tickets, but that these claims are in addition to the claim shown by said Report.

Acceptance of Service.

I hereby accept service of the within Resistance of Phoenix Finance Corporation to the Motions of Iowa-Wisconsin Bridge Company, and acknowledge receipt of a copy of said Resistance, with the Schedules thereto attached, and the Exhibit filed therewith, this 31st day of January, 1940.

F. A. ONTJES,
Attorney for Iowa-Wisconsin
Bridge Company.

Filed in the District Court February 2, 1940.

[fol. 285] (Note by the clerk of the District Court: Copy of the Report of special examination of the accounts of Iowa-Wisconsin Bridge Company entitled "Receipts and Disbursements Iowa-Wisconsin Bridge Company, Lansing, Iowa, from November 1, 1930, to September 25, 1933," referred to in and made a part of Resistance of Phoenix Finance Corporation to Motions of Iowa-Wisconsin Bridge Company, is omitted here because it appears as Exhibit SC-114 at folio pages 730 to 785 of this transcript.)

[fol. 286] (Order Directing that Depositions of George E. Preuss, et al., be not Taken, etc.)

Be it remembered that on this 6th day of February, A. D. 1940, the Motions of the Defendant Iowa-Wisconsin

Bridge Company, one filed January 24, 1940 and one filed January 25, 1940 asking for an Order that the depositions of certain witnesses be not taken, and the Resistance of Phoenix Finance Corporation filed February 2, 1940 came on for hearing, F. A. Ontjes appearing for the Defendant Iowa-Wisconsin Bridge Company, and Casper Schenk appearing for the Complaint Phoenix Finance Corporation;

And the Court having examined said Motions and Resistance and having heard statements of Counsel from which it appears it is proposed to prove by accountants matters bearing upon the issues that were presented and tried in this case some years ago.

[fol. 287] The only material issues to be considered in the Supplemental Complaint is the matter of the identity of the subjects presented for litigation in the Delaware suits described in the Supplemental Complaint with the items considered and determined in this cause, and the identity of these items must be determined from the record. That the depositions in question would not be material, that the witnesses whose testimony is noticed to be taken are incompetent to contravene or overcome the record in this case.

It Is, Therefore, Ordered that the depositions of George E. Preuss, Edgar S. Gage and Lee J. Skoner shall not be taken.

Done and Ordered this 6th day of February, 1940.

Exceptions reserved to the Phoenix Finance Corporation.

GEO. C. SCOTT,
United States District Judge.

Filed in the District Court February 6, 1940.

[fol. 288] (Notice of Phoenix Finance Corporation of Intention to Take Deposition of John A. Thompson.)

To Iowa-Wisconsin Bridge Company, or to its attorneys, F. A. Ontjes and W. C. Green:

You are hereby notified that, in accordance with the notice of Intention to Take Depositions heretofore filed in

the above entitled cause, the deposition of John A. Thompson, a resident of St. Petersburg, Florida, residing at 556 16th Avenue, N. E. in said City, will be taken upon oral examination at 805 Florida Theatre Building, in the City of St. Petersburg, County of Pinellas, State of Florida, on Friday, the 23rd day of February, 1940, commencing at ten o'clock in the forenoon, before Victor O. Wehle, Esquire, Notary Public, or before some other officer then and there qualified to take the same as authorized by law.

JAMES R. MORFORD,
HAROLD W. NORMAN,
CASPER SCHENK,
Attorneys for Phoenix Finance Corporation.

[fol. 289] Acceptance of Service.

Service of the foregoing Notice is hereby acknowledged and copies thereof received this 10th day of February, 1940.

F. A. ONTJES,
W. C. GREEN,
Attorneys for Iowa-Wisconsin Bridge Company.

Filed in the District Court February 12, 1940.

[fol. 290] (Notice of Phoenix Finance Corporation of Intention to Take Deposition of Albert Penn.)

To Iowa-Wisconsin Bridge Company, or to its attorneys, F. A. Ontjes and W. C. Green:

You are hereby notified that, in accordance with the Notice of Intention to Take Depositions heretofore filed in the above entitled cause, the deposition of Albert Penn, a resident of Goshen, Indiana, will be taken upon oral examination at 1709 Harris Trust Building in the City of Chicago, Cook County, Illinois, on Tuesday, the 27th day of February, 1940, commencing at ten o'clock in the forenoon, before Roy Fuller, Notary Public and Court Reporter, or be-

fore some other officer then and there qualified to take the same as authorized by law.

JAMES R. MORFORD,
HAROLD W. NORMAN,
CASPER SCHENK,
Attorneys for Phoenix Finance Corporation.

[fol. 291] Acceptance of Service.

Service of the foregoing Notice is hereby acknowledged and copies thereof received this 10th day of February, 1940.

F. A. ONTJES,
W. C. GREEN,
Attorneys for Iowa-Wisconsin Bridge Company.

Filed in the District Court February 12, 1940.

[fol. 292] (Motion for Order that Depositions of John A. Thompson and Albert Penn be not Taken.)

Comes now the defendant, Iowa-Wisconsin Bridge Company and moves the court as follows:

(a) To enter an order that the depositions of John A. Thompson and Albert Penn specified in Phoenix Finance Corporation's notices served on the 10th day of February 1940 for the taking of depositions shall not be taken.

(b) If order not entered that depositions shall not be taken that then an order be entered that the scope of the examination be limited to specific matters considered competent, relevant and material by the court and that the court order whether such examination be on written interrogatories issued out of this court or on oral interrogatories.

(c) To set and to proceed with the hearing on permanent injunction.

on the following grounds and for the following reasons to-wit:

(1) That this cause has been tried on its merits and that the time for the taking of depositions has expired.

(2) That said John A. Thompson and Albert Penn are directors of the Phoenix Finance Corporation and one of them is president of said corporation.

That Albert Penn was not present at the trial of this [fol. 293] cause nor at the hearing on exceptions to the Masters' Report nor at the hearing of the petition for rehearing in support of which he made an affidavit for the Phoenix Finance Corporation (R. 302-304) and is not in a position to give any material, competent or relevant evidence as to what was involved in this cause, the record itself in this case being the best evidence.

That said John A. Thompson's deposition was taken in this cause prior to trial, a transcript of which is on file in this cause (% 414-500) and he was a witness on the trial of this cause and his testimony appears in transcripts on file herein (R. 538-561; 562-565; 633-637; 651-653; 673-685; 691-692); that he made affidavit for the Phoenix Finance Corporation which are attached to its petition for rehearing on file in this cause (R. 230-231; 355-364); that he is not in a position to give any competent, relevant or material evidence as to what was involved in the hearings in this cause, the record itself being the best evidence.

That the said John A. Thompson and Albert Penn, whose testimony is noticed to be taken, are incompetent to contravene or overcome the record in this cause.

That the said Phoenix Finance Corporation is merely attempting and proposing to take said depositions with respect to matters stricken from the allegations of its answer to the supplemental bill and which have been previously adjudicated by this court in this cause.

Paragraph nine of the supplemental bill alleges that John A. Thompson asserted about December 6th, 1938 "that the litigation involved in this action was not ended and would not be ended for a good many years. That on the 8th day of July 1939 as president of the Phoenix Finance Corporation said Thompson asserted that one case had been tried in the courts of Delaware in June 1939 and

that the thing, referring to the matters involved in this action, was not over, and that there were six cases in the [fol. 294] state of Delaware that would be carried on in the course of the next few months."

The Phoenix Finance Corporation's answer thereto is a denial but admits the last clause of the allegation, which is the material part.

Phoenix Finance Corporation attached to its resistance filed February 2, 1940 to motions that certain depositions be not taken what it claims to be excerpts of record of proceedings of annual meeting of Class "B" stockholders of the Iowa-Wisconsin Bridge Company on July 8, 1939 as reported by Vernon L. Grant, certified shorthand reporter, Des Moines, Iowa, in which it is stated that John A. Thompson on said date, among other things, stated: "Mr. Ontjes has stated here and he stated in the December meeting that the litigation between the Phoenix and the bridge company was over. Now in the first place there never was any litigation between the Phoenix and the bridge company. * * * Now this indebtedness can be properly presented and evidence can be put in down in the Delaware Court. That is now being done. There are six cases down there now that will be carried on through the course of the next few months."

That the Phoenix Finance Corporation has a transcript of the statements of the said certified shorthand reporter Vernon L. Grant and no reason exists why they cannot produce such transcript as to any such statements, and that there is not sufficient material difference between the allegations of the Supplemental Bill in that respect and Phoenix Finance Corporation's Answer and statements as claimed by it in its resistance to necessitate the taking of any deposition with respect thereto.

That in paragraph ten of the Supplemental Bill it is alleged that John A. Thompson wrote certain letters containing certain statements and the Phoenix Finance Corporation's Answer admits that said letters were written [fol. 295] by John A. Thompson in substance substantially as alleged. To the above mentioned resistance on file herein the Phoenix Finance Corporation attached copies

of said letters which it has stated are true copies and which contain the identical language alleged in the Supplemental Bill and there is no occasion to take any depositions with respect to said letters.

That as to the subjects presented for litigation in the Delaware suits described in the Supplemental Bill the Phoenix Finance Corporation's Answer with respect thereto substantially admits the allegations of the complaint as amended and if in any respect not admitted in the Answer or other papers filed by Phoenix herein, then certified exemplified copies of the pleadings in said suits will be the best evidence thereof and the said John A. Thompson and Albert Penn are not competent witnesses and can give no competent, relevant or material evidence as to the subjects of said suits.

That the Phoenix Finance Corporation in its answer answering paragraph 11 of the Supplemental Bill admits the recording of the mortgage therein mentioned and that the court in this cause made findings with respect to said mortgage substantially as alleged in the Supplemental Bill.

That the said witnesses are not in position to give competent, relevant or material evidence under the issues joined.

That the time for the taking of the depositions of said John A. Thompson and Albert Penn mentioned in the aforesaid notice for the taking of depositions has expired and will have expired before said depositions can be taken.

That no reason has been assigned why the said Phoenix Finance Corporation cannot have its said directors and president John A. Thompson and Albert Penn present on [fol. 296] the hearing for permanent injunction nor has it been asserted that they will not be present at such hearing. That they have been in attendance on the various hearings had with respect to the Supplemental Bill as Amended and Answer thereto herein, except the last hearing on motion that certain depositions be not taken.

F. A. ONTJES,
W. C. GREEN,
Attorneys for the Iowa-Wisconsin Bridge Company.

State of Iowa,
Cerro Gordo County—ss.:

I, F. A. Ontjes, being first duly sworn on oath depose and say that I am an attorney for the Iowa-Wisconsin Bridge Company; that I have read the statements contained in the foregoing Motion and that the same are true as I verily believe.

F. A. ONTJES.

Subscribed and sworn to before me by the said F. A. Ontjes this 10th day of February A. D. 1940.

F. T. BARRETT,
(Seal) Notary Public in and for Cerro Gordo County, Iowa.

Filed in the District Court February 12, 1940.

[fol. 297] (Application for an Order That Depositions of John A. Thompson and Albert Penn Be Not Taken Until the Further Order of Court.)

Comes now the defendant, Iowa-Wisconsin Bridge Company and respectfully shows to this Honorable Court that the Phoenix Finance Corporation on the 10th day of February 1940 served notices for the taking of the deposition of John A. Thompson on the 23rd day of February 1940 in St. Petersburg, Florida and for the taking of the deposition of Albert Penn on the 27th day of February 1940 in Chicago, Illinois; that this defendant immediately prepared a motion for an order that said depositions be not taken (Rule 30 (b)); and mailed the same to the Clerk of this Court and the said Motion was filed February 12th, 1940; and this defendant also immediately mailed notice of hearing of said motion at Sioux City, Iowa on the 5th day of March 1940 with copy of said Motion thereto attached to Casper Schenk, Attorney for Phoenix Finance Corporation addressed to him at Des Moines, Iowa (Rule 5 (b)); and that service of said notice was also acknowledged and accepted February 12, 1940 by said attorney; that said motion for an order that deposition of said witnesses John A. Thompson and Albert Penn specified in the notices to take depositions be not taken under the rules

of this court and notice served in accordance therewith will come on for hearing on the 5th day of March 1940 at [fol. 298] Sioux City, Iowa or as soon thereafter as the same can be heard by this Court; this defendant also stated in said notice that it consents that said motion may be heard by the Court at any earlier date convenient to the court. That to permit the Phoenix Finance Corporation to take said depositions on the 23rd and 27th days of February 1940 as specified in said notices would deprive this defendant of the benefit of Rule 30 (b) entitling it to a ruling of this court on said motion before such depositions are taken and would cause this defendant considerable unnecessary expense if not entitled to be taken.

Wherefore defendant, Iowa-Wisconsin Bridge Company, asks this Honorable Court to enter an order that said depositions shall not be taken until after said motion has been ruled upon by this court, and then only if this court rules that they may be taken. (Rule 30 (a) — Rule 6 (b)).

F. A. ONTJES,
W. C. GREEN,
Attorneys for the Iowa-Wis. Bridge Company.

State of Iowa,
Cerro Gordo County—ss.:

I, F. A. Ontjes, being first duly sworn on oath depose and say that I am an attorney for the Iowa-Wisconsin Bridge Company and have read the statements contained in the foregoing application and that the same are true as I verily believe.

F. A. ONTJES.

Subscribed and sworn to before me by the said F. A. Ontjes this 13th day of February A. D. 1940.

F. T. BARRETT,
(Notarial Seal)
Notary Public in and for Cerro Gordo County, Iowa.

Filed in the District Court February 14, 1940.

[fol. 299] (Order that Depositions of John A. Thompson and Albert Penn be not taken until Court has ruled on Motion and Application.)

Be It Remembered that on this 14 day of February 1940 the Application of the Iowa-Wisconsin Bridge Company for an order that depositions be not taken until further order of this court came on for hearing and the court having examined said application and being fully advised in the premises it is hereby

Ordered that the depositions of John A. Thompson and Albert Penn shall not be taken until this court has ruled on the motion on file mentioned in said application and then only if this court rules that said depositions may be taken.

GEO. C. SCOTT,
Judge United States District Court.

Signed in Chambers at Sioux City, Iowa, to be entered of record in the Eastern Division.

Filed in the District Court February 14, 1940.

[fol. 300] (Notice of Hearing of Motion that Depositions of John A. Thompson and Albert Penn be not taken, etc.)

To Casper Schenk, James R. Morford and H. W. Norman, attorneys for Phoenix Finance Corporation:

You And Each Of You Are Hereby Notified that the defendant, Iowa-Wisconsin Bridge Company, has filed a motion in the above entitled cause, a copy of which is hereto attached and made a part hereof, and that said motion will come on for hearing and submission at Sioux City, Iowa in the United States District Court Room on March 5th, 1940 or as soon thereafter as the same can be heard by the court. We consent that said motion may be heard by the court at any earlier date convenient to the Court.

F. A. ONTJES,
W. C. GREEN,

We hereby accept service of the foreging Notice and acknowledge receipt of copy of Motion thereto attached this 12th day of February, A. D. 1940.

JAMES R. MORFORD,
H. W. NORMAN,
CASPER SCHENK,
Attorneys for Phoenix Finance Corporation.

Filed in the District Court Feoruary 14, 1940.

[fol. 301] Motion For Order That Depositions of John A. Thompson and Albert Penn Be Not Taken.

In the District Court of the United States In and For the Northern District of Iowa, Eastern Division.

First Trust & Savings Bank (formerly Bechtel Trust Company) and A. H. Schubert as Trustees and Phoenix Finance Corporation, Complainants,

#220. vs. Equity.

Iowa-Wisconsin Bridge Company, a corporation, Defendant,

Fayette D. Kendrick, et al., Interveners.

Comes now the defendant, Iowa-Wisconsin Bridge Company and moves the court as follows:

(a) To enter an order that the depositions of John A. Thompson and Albert Penn specified in Phoenix Finance Corporation's notices served on the 10th day of February, 1940, for the taking of depositions shall not be taken.

(b) If order not entered that depositions shall not be taken that then an order be entered that the scope of the examination be limited to specific matters considered competent, relevant and material by the court and that the court order whether such examination be on written interrogatories issued out of this court or on oral interrogatories.

(c) To act and to proceed with the hearing on permanent injunction.

on the following grounds and for the following reasons, to-wit:

(1) That this cause has been tried on its merits and that the time for the taking of depositions has expired.

(2) That said John A. Thompson and Albert Penn are directors of the Phoenix Finance Corporation and one of [fol. 302] them is president of said corporation.

That Albert Penn was not present at the trial of this cause nor at the hearing on exceptions to the Master's Report nor at the hearing of the petition for rehearing in support of which he made an affidavit for the Phoenix Finance Corporation (R302-304) and is not in a position to give any material, competent or relevant evidence as to what was involved in this cause, the record itself in this case being the best evidence.

That said John A. Thompson's deposition was taken in this cause prior to trial, a transcript of which is on file in this cause (R. 414-500) and he was a witness on the trial of this cause and his testimony appears in transcript on file herein (R. 538-561; 562-565; 633-637; 651-653; 673-685; 691-692); that he made affidavits for the Phoenix Finance Corporation which are attached to its petition for rehearing on file in this cause (R230-231; 355-364) that he is not in a position to give any competent, relevant or material evidence as to what was involved in the hearings in this cause, the record itself being the best evidence.

That the said John A. Thompson and Albert Penn, whose testimony is noticed to be taken, are incompetent to contravene or overcome the record in this cause.

That the said Phoenix Finance Corporation is merely attempting and proposing to take said depositions with respect to matters stricken from the allegations of its answer to the supplemental bill and which have been previously adjudicated by this court in this cause.

Paragraph nine of the supplemental bill alleges that John A. Thompson asserted about December 6th, 1938, "that the litigation involved in this action was not ended and would not be ended for a good many years. That on the 8th day of July, 1939, as president of the Phoenix Finance Corporation said Thompson asserted that one case had been [fol. 303] tried in the courts of Delaware in June, 1939,

and that the thing, referring to the matters involved in this action, was not over, and that there were six cases in the state of Delaware that would be carried on in the course of the next few months."

The Phoenix Finance Corporation's answer thereto is a denial but admits the last clause of the allegation, which is the material part.

Phoenix Finance Corporation attached to its resistance filed February 2, 1940, to motions that certain depositions be not taken what it claims to be excerpts of record of proceedings of annual meeting of Class "B" stockholders of the Iowa-Wisconsin Bridge Company on July 8, 1939, as reported by Vernon L. Grant, certified shorthand reporter, Des Moines, Iowa, in which it is stated that John A. Thompson on said date, among other things, stated: "Mr. Ontjes has stated here and he stated in the December meeting that the litigations between the Phoenix and the bridge company was over. Now in the first place there never was any litigation between the Phoenix and the bridge company. * * * Now this indebtedness can be properly presented and evidence can be put in down in the Delaware Court. That is now being done. There are six cases down there now that will be carried on through the course of the next few months."

That the Phoenix Finance Corporation has a transcript of the statements of the said certified shorthand reporter Vernon L. Grant and no reason exists why they cannot produce such transcript as to any such statements, and that there is not sufficient material difference between the allegations of the Supplemental Bill in that respect and Phoenix Finance Corporation's Answer and statements as claimed by it in its resistance to necessitate the taking of any deposition with respect thereto.

[fol. 304] That in paragraph ten of the Supplemental Bill it is alleged that John A. Thompson wrote certain letters containing certain statements and the Phoenix Finance Corporation's Answer admits that said letters were written by John A. Thompson in substance substantially as alleged. To the above mentioned resistance on file herein the Phoenix Finance Corporation attached copies of said letters

which it has stated are true copies and which contain the identical language alleged in the Supplemental Bill and there is no occasion to take any depositions with respect to said letters.

That as to the subjects presented for litigation in the Delaware suits described in the Supplemental Bill the Phoenix Finance Corporation's Answer with respect thereto substantially admits the allegations of the complaint as amended and if in any respect not admitted in the Answer or other papers filed by Phoenix herein, then certified exemplified copies of the pleadings in said suits will be the best evidence thereof and the said John A. Thompson and Albert Penn are not competent witnesses and can give no competent, relevant or material evidence as to the subjects of said suits.

That the Phoenix Finance Corporation in its answer answering paragraph 11 of the Supplemental Bill admits the recording of the mortgage therein mentioned and that the court in this cause made findings with respect to said mortgage substantially as alleged in the Supplemental Bill.

That the said witnesses are not in position to give competent, relevant or material evidence under the issues joined.

That the time for the taking of the depositions of said John A. Thompson and Albert Penn mentioned in the aforesaid notice for the taking of depositions has expired and [fol. 305] will have expired before said depositions can be taken.

That no reason has been assigned why the said Phoenix Finance Corporation cannot have its said directors and president John A. Thompson and Albert Penn present on the hearing for permanent injunction nor has it been asserted that they will not be present at such hearing. That they have been in attendance on the various hearings had with respect to the Supplemental Bill as amended and Answer thereto herein, except the last hearing on motion that depositions be not taken.

F. A. ONTJES,
W. C. GREEN,
Attorneys for the Iowa-Wisconsin Bridge Company.

State of Iowa,
Cerro Gordo County.—ss.:

I, A. F. Ontjes, being first duly sworn on oath depose and say that I am an attorney for the Iowa-Wisconsin Bridge Company; that I have read the statements contained in the foregoing Motion and that the same are true as I verily believe.

F. A. ONTJES.

Subscribed and sworn to before me by the said F. A. Ontjes this 10th day of February, A. D. 1940.

(Seal)

F. T. BARRETT,
Notary Public in and for
Cerro Gordo County, Iowa.

[fol. 306] (Order Setting Case For Hearing on Motion to Stay Taking of Depositions and Merits.)

Ordered that the motion to stay the taking of depositions be assigned for final hearing, and the cause be also assigned for trial on its merits, on March 5th, proximo at ten o'clock A. M., at the United States Court Room in Sioux City, Iowa.

Done and Ordered at Sioux City, Iowa, this 14th day of February, 1940, to be entered of record in the Eastern Division.

GEO. C. SCOTT,
United States District Judge.

Filed in the District Court February 14, 1940.

[fol. 307] (Order Reassigning Case For Trial on Merits.)

It is now Ordered that the above entitled cause is reassigned for trial on its merits for March 11th, 1940, at two o'clock P. M., in the United States Court Room at Sioux City, Iowa.

Done and Ordered at Sioux City, Iowa, this 19th day of February, 1940, to be entered of record in the Eastern Division.

GEO. C. SCOTT,
United States District Judge.

Filed in the District Court February 19, 1940.

[fol. 308] Resistance of Phoenix Finance Corporation to Motion of Iowa-Wisconsin Bridge Company for Order That Depositions of John A. Thompson and Albert Penn be Not Taken.)

Now comes Phoenix Finance Corporation, impleaded as a party complainant by order of Court in the above stated cause, and defendant in the Supplemental and Ancillary Bill of Complaint filed by Iowa-Wisconsin Bridge Company, the original defendant in said cause and the complainant in said Supplemental and Ancillary Bill of Complaint, and resists the motion of Iowa-Wisconsin Bridge Company for an order that the depositions of John A. Thompson and Albert Penn be not taken, which said motion was verified February 10, 1940. As grounds of resistance to said motion Phoenix Finance Corporation respectfully shows as follows:

1. This cause has not been tried on its merits with respect to said Supplemental and Ancillary Bill of Complaint, as amended, of Iowa-Wisconsin Bridge Company and the Answer and Counterclaim of Phoenix Finance Corporation thereto. The time for taking depositions has not expired for the reason that pursuant to Rule 5 of the Rules of the United States District Court for the Northern District of Iowa, Phoenix Finance Corporation, within ten days after the pleadings were closed on said Supplemental and Ancillary Bill of Complaint as amended and said Answer and Counterclaim thereto, filed with the Clerk of this Court a statement of intention to take depositions for use at the trial of this cause, naming the witnesses and their addresses and stating the particular occasion for taking such testimony in such form, as by reference to said notice filed in this cause will more fully appear. Said depositions of witnesses on behalf of Phoenix Finance Corporation were also proposed to be taken pursuant to Rules 26, 28, and 30 of the Rules of Civil Procedure for the District Courts of the United States, wherein it is provided inter alia that the testimony of any person may be taken at the instance of any party, by deposition upon oral examination at any time after an Answer has been served and without leave of Court.

2. Albert Penn is an officer and director of Phoenix Finance Corporation and resides at Goshen in the State of

[fol. 309] Indiana. John A. Thompson is a director, but not an officer, of Phoenix Finance Corporation, and resides at St. Petersburg, in the State of Florida. Neither of said witnesses is in the Northern District of Iowa or within a hundred miles of the place of the trial of this cause, or otherwise within the jurisdiction of this Court so as to be subject to the service of a subpoena. Phoenix Finance Corporation has and can have no assurance that said witnesses, or either of them, will be available to testify in person at the trial of this cause and desires to take their testimony by deposition as provided by the said Rules of Civil Procedure, for use in the event said witnesses, or either of them, for any reason whatsoever, are not available in person at the trial. There is no statute or rule of Court requiring a party litigant to produce personally at the trial of a cause, non-resident witnesses who are not subject to subpoena, or are otherwise unavailable, even though such witnesses are officers and/or directors of a corporate party. There is no statute nor rule of court prohibiting, or in any way limiting the right of Phoenix Finance Corporation to take the depositions of said witnesses in this cause and, on the contrary, the right to take such depositions is specifically provided by the Rules of Civil Procedure governing the practice in the District Courts of the United States. Phoenix Finance Corporation denies that the said John A. Thompson and the said Albert Penn are not in a position to give material, competent or relevant evidence as to the issues in this cause, and on the contrary avers that the issues in this cause are as hereinafter stated, and that by the depositions of the said John A. Thompson and Albert Penn, Phoenix Finance Corporation expects to prove as evidence in this cause on its behalf, and that said witnesses will testify to, the facts inter alia stated in the Schedules attached to the Resistance verified January 31, 1940, heretofore filed in this cause to other motions of Iowa-Wisconsin Bridge Company, said Schedules being entitled "Testimony of John A. Thompson", and "Testimony of Albert Penn", respectively, and including certain Exhibits attached thereto, and said former Resistance and each and every averment thereof, and said Schedules of Testimony and Exhibits, by this reference thereto, are incorporated in this Resistance with the same force and effect as though set forth in full herein.

3. Phoenix Finance Corporation denies that John A. [fol. 310] Thompson at any time testified in the principal cause herein as a witness on behalf of Phoenix Finance Corporation, although he was called as a witness on behalf of the Trustee Complainants, and as a witness on behalf of Iowa-Wisconsin Bridge Company, the defendant, with respect to the issue of mortgage foreclosure. The said John A. Thompson, although at all times available as a witness on behalf of Phoenix Finance Corporation in the principal cause, did not testify and was not permitted to testify on behalf of Phoenix Finance Corporation, nor was the said Phoenix Finance Corporation permitted to offer evidence in support of any claim or demand of any character of Phoenix Finance Corporation against Iowa-Wisconsin Bridge Company, or in defense of any supposed set off or counterclaim of Iowa-Wisconsin Bridge Company against Phoenix Finance Corporation, for the reason that no such issues were involved in said cause, nor were within the scope of the pleadings, nor were within the contemplation of the parties, their attorneys, or the Special Master, at that stage of the proceedings comprehended by the record in this cause. Phoenix Finance Corporation although desiring to offer evidence on its behalf in said principal cause was informed by the attorneys for the respective parties and by the Special Master that the testimony on its behalf as a bondholder of Iowa-Wisconsin Bridge Company would not be permitted at that stage of the proceedings, but that, after the issue of foreclosure had been decided and foreclosure ordered, and if then the status of Phoenix Finance Corporation as a bondholder were attached or challenged, then and then only might Phoenix Finance Corporation properly offer testimony to support its position as a bondholder, and thereby to prove, where necessary, the underlying considerations for any bonds held or owned by it; and that in this event the testimony of John A. Thompson as a witness on behalf of Phoenix Finance Corporation as such bondholder would be permitted and would have been relevant and proper. Although the Master's report recommended a decree of foreclosure, the Master's report in this respect was reversed by the District Court and accordingly Phoenix Finance Corporation was at no time accorded an opportunity to present testimony on its behalf in this cause [fol. 311] with respect to the issues involved in the six

proceedings in the State of Delaware mentioned in paragraph 7 of the Supplemental and Ancillary Bill, or with respect to the consideration for and validity of said $50,000 mortgage, or with respect to its ownership of less than 50% of the Voting Capital Stock of the Bridge Company, or with respect to the facts to disprove any domination or control of its affairs, or the affairs of the Bridge Company by John A. Thompson. Phoenix Finance Corporation therefore avers and shows that not only was it not such a party to said original cause that a valid adjudication could be made against it, and not only were there no issues in said cause relating to the matters involved in the Supplemental and Ancillary Bill, but also and further, that Phoenix Finance Corporation was not permitted at any of the hearings in said original cause to offer testimony on its behalf through the witnesses, John A. Thompson, Albert Penn, or any other person or persons, to prove any claim or demand of any character of Phoenix Finance Corporation against Iowa-Wisconsin Bridge Company or to disprove any supposed set-off or counterclaim of Iowa-Wisconsin Bridge Company against Phoenix Finance Corporation.

4. Phoenix Finance Corporation further shows that the deposition of John A. Thompson taken prior to the trial of the original cause herein (R. 414-500) and referred to in the motion of Iowa-Wisconsin Bridge Company is not properly a part of the record of the evidence in this cause for the reason that said deposition by order of this Court dated October 28, 1937 (R. 216) was ordered to be printed as a part of the record for use only in the presentation of the question as to whether or not the trial Court arbitrarily and in abuse of discretion overruled the appellants' motion for rehearing, "but for no other purpose." At no time was said deposition or any part thereof admitted in evidence in said original cause on behalf of any party thereto, but on the contrary the same was filed with the Clerk of this Court at Dubuque, Iowa, without a disclosure being made of the limited purpose for which the same was to be used as above stated, and thereafter the same was, without appropriate notation being made of the limited

purpose thereof as above stated, incorporated generally in [fol. 312] the printed record on appeal in the original cause. Neither said deposition nor the affidavits of John A. Thompson and Albert Penn filed in support of the Petitions for Rehearing in said original cause are or can be considered as evidence on behalf of Phoenix Finance Corporation in this cause on the Supplemental and Ancillary Bill of Complaint, and in order to sustain and prove the allegations set forth in said affidavits, Phoenix Finance Corporation will be required to prove all of said facts either by producing the witnesses to prove the same at the trial of this cause, or by taking the depositions of such witnesses who are or may not be so available.

5. Phoenix Finance Corporation denies that it is attempting and proposing to take the depositions of John A. Thompson and Albert Penn, or any depositions whatsoever, with respect to matters stricken from the allegations of its Answer and Counterclaim to the Supplemental and Ancillary Bill of Complaint, or with respect to any matters which have been previously validly adjudicated by this Court in this cause against it. The issues in this cause as defined by the pleadings, eliminating those portions of the Answer and Counterclaim of Phoenix Finance Corporation stricken by Order of this Court of December 18, 1939 (reserving all manner of exception to said Order) include the following:

(a) In Paragraph 2 of the Supplemental and Ancillary Bill of Complaint, Iowa-Wisconsin Bridge Company alleges "That by said final decree all matters and differences between the complainant, Phoenix Finance Corporation, and its predecessor, Phoenix Finance System, Inc. on the one hand, and the defendant Iowa-Wisconsin Bridge Company on the other, were fully settled, adjudicated and determined, and that since the entry of said decree there have been no business transactions whatsoever between said defendant Iowa-Wisconsin Bridge Company and said complainant Phoenix Finance Corporation or its predecessor". By paragraph 2 of the Answer and Counterclaim of Phoenix Finance Corporation said allegations are denied and an issue of fact is thereby created.

(b) In paragraph 5 of the Supplemental and Ancillary Bill of Complaint it is alleged by Iowa-Wisconsin Bridge

Company with respect to the original cause herein "that this cause was defended against the unjust claims of the Phoenix Finance Corporation at great expense to the Bridge Company and in said action the various claims of the Phoenix Finance Corporation were fully heard and adjudicated". It is further alleged in said paragraph of [fol. 313] the Supplemental and Ancillary Bill that the taking of depositions "involved a great deal of time", and that "the trial of this cause before the Master involved a number of weeks", and "that the hearing before this court on exceptions involved months of work", and that the hearing before this court to settle the record on appeal "involved many additional weeks of work". These allegations of fact are all denied in paragraph 5 of the Answer and Counterclaim of Phoenix Finance Corporation, and while Phoenix Finance Corporation recognizes the probable immateriality of the length of time involved in the trials and hearings in the original cause it nevertheless proposes to show and prove, as above stated, that no testimony was taken or evidence offered on its behalf and, if material, that the trial before the Master involved actually less than two weeks, and that practically all the evidence was adduced on behalf of the Interveners and related to matters wholly immaterial and irrelevant to the issues in said cause as defined by the pleadings.

(c) In paragraph 6 of the Supplemental and Ancillary Bill of Complaint it is alleged by Iowa-Wisconsin Bridge Company that Phoenix Finance Corporation is disregarding the adjudication and order of this Court, and that said Phoenix Finance Corporation "for the purpose of depriving this defendant of the fruits of said adjudication and for the purpose of harassing, vexing and annoying and destroying the business of this defendant, has commenced and is prosecuting and is about to prosecute in the state of Delaware numerous and divers suits and actions involving the same matters fully and finally determined by said United States District Court for the Northern District of Iowa and has further and in contempt of said Court filed for record and recorded the $50,000 mortgage hereinbefore and hereinafter referred to". The said allegations of fact with respect to the purpose for which Phoenix Finance Corporation has instituted said actions in Delaware, and

has recorded said mortgage, are denied by paragraph 6 of the Answer and Counterclaim of Phoenix Finance Corporation and issues of fact are hereby created.

(d) In paragraph 8 of the Supplemental and Ancillary Bill of Complaint it is alleged by Iowa-Wisconsin Bridge Company that "it has had no business with the said Phoenix Finance Corporation since the commencement of this [fol. 314] action and alleges on information and belief that the said actions are a mere attempt on the part of the Phoenix Finance Corporation to relitigate the matters involved in this cause and decided by this court". All of said allegations are denied by paragraph 8 of the Answer and Counterclaim of Phoenix Finance Corporation and issues of facts are thereby created.

(e) Paragraph 9 and 10 of the Supplemental and Ancillary Bill of Complaint contain allegations of fact denied by paragraphs 9 and 10, respectively, or the Answer and Counterclaim of Phoenix Finance Corporation, and in this respect issues of fact are framed requiring testimony to prove and/or to disprove the same by the respective parties. In this respect the said John A. Thompson will particularly testify that he did not state or assert about December 6, 1938, or at any other time "that the litigation involved in this action was not ended and would not be ended for a good many of years". He will further testify that he was not President of Phoenix Finance Corporation on July 8, 1939, and did not, as President of Phoenix Finance Corporation, or otherwise, assert "that the thing, referring to the matters involved in this case, was not over, ***", but on the contrary that the said John A. Thompson stated and asserted with respect to said litigation only the things stated in the typewritten transcript of the shorthand notes of Vernon L. Grant, Exhibit "A" to the "Schedule of Testimony of Albert Penn", to which reference is above made. The said John A. Thompson will further testify and prove that a certain allegation of Iowa Wisconsin Bridge Company, as contained in paragraph 10 of the Supplemental and Ancillary Bill, and purporting to be a quotation from a letter written by the said John A. Thompson to the stockholders of the Bridge Company is a misquotation from the letter of said John A. Thompson

to which reference is made, and that the copy of said letter attached as an exhibit to the "Schedule of Testimony of the said John A. Thompson" to which reference is above made is a true and complete copy of said letter.

(f) In paragraph 11 of the Supplemental and Ancillary Bill of Complaint, Iowa-Wisconsin Bridge Company has alleged that by the recording of the $50,000 mortgage, dated March 10, 1931, "Phoenix Finance Corporation has wrongfully cast a cloud upon the title of this defendant to [fol. 315] its property and has attempted to render null and void that portion of the decree and order of this court finally determining the invalidity of said mortgage". Said allegations of fact are denied by paragraph 11 of the Answer and Counterclaim of Phoenix Finance Corporation and issues are thereby framed for the determination of this Court at the trial of this cause.

(g) The allegations of paragraph 12 of the Supplemental and Ancillary Bill of Complaint while, to a large extent, conclusions either of fact or of law from other facts elsewhere in said Supplemental and Ancillary Bill alleged, are nevertheless denied by Phoenix Finance Corporation by paragraph 12 of its Answer and Counterclaim, except that it admits an intention to prosecute the actions described in paragraph 7 of the Supplemental and Ancillary Bill, and that it proposes to permit said $50,000 mortgage to remain on record. Accordingly further issues are before the Court for adjudication in this cause.

(h) With respect to the cause of action in the Superior Court of the State of Delaware, referred to in paragraph 7 (e) of the Supplemental and Ancillary Bill of Complaint, Phoenix Finance Corporation is entitled to show that this suit is upon bonds, which, at the time of the institution of the foreclosure suit in the original cause, at the times of the hearings thereon, and at the time of the decree therein, were in the hands of an innocent holder in due course for value, who was not and who could not properly be a party to this cause, and by such evidence to show that there was and has been no adjudication with respect to the bonds sued upon in said action which is or can be binding upon Phoenix Finance Corporation, the present holder thereof.

(i) With respect to the cause of action in the Court of Chancery of the State of Delaware, set forth in paragraph 7 (b) of the Supplemental and Ancillary Bill, it is alleged by Iowa-Wisconsin Bridge Company in said paragraph that the said 517 shares of Class "A" Stock of Iowa-Wisconsin Bridge Company were "surrendered and cancelled at the time said Phoenix Finance Corporation fraudulently procured the issuance of $60,500 of bonds involved in and as found in this action". Said allegation of fact is denied by paragraph 7 (b) of the Answer and Counterclaim of Phoenix Finance Corporation, and Phoenix Finance Corporation is entitled to offer evidence to prove that said [fol. 316] shares of stock were transferred to the name of Iowa-Wisconsin Bridge Company, and were and still are carried on the books of said company as Treasury Stock. The said last mentioned cause in the Court of Chancery further relates to matters peculiarly within the jurisdiction of the courts of the domicile of Iowa-Wisconsin Bridge Company, and the issues as framed in said cause are not matters properly cognizable in this cause in this Court. With respect to such issues of fact the testimony of John A. Thompson and Albert Penn will be material and relevant and if Phoenix Finance Corporation is denied the right to take the depositions of said witnesses in this respect, the said Phoenix Finance Corporation will thereby be denied due process of law in this cause.

(j) With further relation to the issues in this cause as defined by the Supplemental and Ancillary Bill of Complaint of Iowa-Wisconsin Bridge Company, and the Answer and Counter-claim of Phoenix Finance Corporation, reference is made to the aforesaid Resistance of Phoenix Finance Corporation filed to the former motions of Iowa-Wisconsin Bridge Company herein, and as above stated said Resistance and each and every averment thereto and the Schedules of Testimony and Exhibits attached thereto, are by this reference incorporated herein.

6. The Motion of Iowa-Wisconsin Bridge Company to which this Resistance is filed concedes the materiality of the transcript of the statements of John A. Thompson at the Stockholders' Meeting of Iowa-Wisconsin Bridge Company, held on July 8, 1939, as taken in shorthand notes

and transcribed by Vernon L. Grant, certified shorthand reporter. Phoenix Finance Corporation avers and shows that if said transcript is relevant and material, the testimony of both John A. Thompson and Albert Penn, with respect to the statement of John A. Thompson at said meeting, and that said transcript of Vernon L. Grant is correct and complete, is likewise material and relevant to the issues in this cause, and that the depositions of said witnesses with respect thereto should be permitted. With respect to the allegations of paragraph 10 of the Supplemental and Ancillary Bill of Complaint, and the Answer of Phoenix Finance Corporation thereto, the said John A. Thompson as the writer of the letters referred to therein should be permitted to identify and prove the same, said letters being as shown by Exhibits "A" and "B" to the "Schedule of Testimony of John A. Thompson", filed as [fol. 317] a part of the Resistance of Phoenix Finance Corporation to which reference is above made. Except by the testimony of John A. Thompson with respect to these letters either before the Court on final hearing or by deposition, the authenticity and accuracy of said letters cannot be established.

7. Phoenix Finance Corporation for the reasons above and hereinafter stated denies that the witnesses, John A. Thompson and Albert Penn are not in a position to give competent, relevant or material testimony in this cause, and deny for the reasons stated in paragraph 1 hereof that the time for the taking of depositions of said witnesses has expired or will expire before said depositions can be taken. Phoenix Finance Corporation further avers that it is not required by any Statute or Rule of Court or of Practice to show that it cannot have its Director, John A. Thompson, and its Director and President, Albert Penn, present at the final hearing of this cause, or to assign reasons therefor, nor is it required by any Statute or Rule that said witnesses must appear in person at the trial. Even though Phoenix Finance Corporation expected to have said persons present at the trial of this cause, it would be proper and in conformity with the Statutes of the United States, the Rules of Civil Procedure in the Courts of the United States, and the Rules of the United States District Court for the Northern District of Iowa, that depositions

of these or any other non-resident witnesses be taken prior to trial in order that the same may be used in the event said witnesses or either or any of them should for any reason whatsoever not be available to testify in person at the trial.

8. Reserving its exception to the Order of this Court, dated December 18, 1939, striking certain portions of the Answer and Counterclaim of Phoenix Finance Corporation, said Phoenix Finance Corporation nevertheless further respectfully avers and shows that, even with the elimination of the portions of its Answer and Counterclaim so stricken, this Court, sitting as a Court of Equity and conscience should, upon a showing in any form or upon the Court obtaining cognizance in any manner that any ruling made by it, prejudicial to the interests of any party, was so made upon a misconception of the facts shown by the record, or upon the basis of facts not shown by the record, or that the same was induced or brought about by fraud [fol. 318] and misrepresentation on the part of counsel for the prevailing party, upon its own motion, review and revise such ruling to conform with the facts, and, if necessary and in furtherance of the ends of justice, set the same aside. In this respect Phoenix Finance Corporation furthere avers and shows that while the record in this cause contains many instances of misrepresentations on the part of counsel for the Interveners with respect to the record, that there are certain of said representations that have been particularly prejudicial to Phoenix Finance Corporation. The attention of the Court is particularly directed to its Order dated March 4, 1937 (R. 410-413) over-ruling the Petitions for Rehearing and Motion for Vacation of Original Decree, wherein this Court said;

"The Interveners obtained an Order of Court for the production of the books and records of Phoenix Finance Corporation before the Master, but Phoenix Finance Corporation vigorously and successfully, it appears, prevented the production of these books and records, and its officer went on the stand before the Master, declared his inability to produce, for they had been sent to the State of Florida. It is now with poor grace that the plaintiffs invoke the discretion of the Court for a rehearing in order to use those very books and records."

The finding in this opinion to the effect that "Phoenix Finance Corporation vigorously and successfully * * * * prevented the production of those books and records" is not only unsupported by the record of this cause, but is contradicted by the record, the facts being as stated in paragraph 43 of the Answer and Counterclaim of Phoenix Finance Corporation, a part of its Answer and Counterclaim so stricken as aforesaid, and Phoenix Finance Corporation avers and shows that the Court was misled and imposed upon by the deliberate misrepresentations of the attorney for the Interveners that Phoenix Finance Corporation had defied the order of this Court of April 24, 1934, directing that:

"the defendant, Phoenix Finance Corporation, produce at its office in Des Moines, Iowa, all its books and records appertaining to the business and affairs of the Iowa-Wisconsin Bridge Company within ten days from date of this order and submit them to the inspection of the intervener and its counsel and accountant." (R. 96)

In view of the fact that this Court then declined to exercise its discretion to grant a rehearing, upon the basis of facts [fol. 319] not established by the record, and upon facts contradicted by the record, and upon the basis of a misrepresentation of counsel as aforesaid, Phoenix Finance Corporation shows that it has been prejudiced thereby and will at the trial of this cause ask this Court to correct its findings in accordance with the facts, and to review its order denying said petitions for rehearing. In like manner this Court found that there was no consideration for the $50,000 mortgage above stated, and that the two checks for $35,000 and $15,000, respectively, representing said consideration were purely fictitious. This Court also found that Phoenix Finance Corporation owned 51% of the voting Common Stock of Iowa-Wisconsin Bridge Company. These facts in like manner are not supported by the record in this cause, are in fact contradicted by the record in this cause, and are based upon mis-statements and misrepresentations of evidence by counsel for the Interveners. Accordingly, the decree of this Court was in these respects and in other respects induced by misrepresentation and fraud, and Phoenix Finance Corporation appeals to the discretion of this Court in the exercise of its inher-

ent jurisdiction, to at any time review and revise orders and decrees so obtained and to do equity and justice in the premises. Phoenix Finance Corporation proposes by the testimony of witnesses at the trial of this cause, and/or by depositions to be taken in this cause, to show to the Court the misrepresentations, fraud and fraudulent devices practiced on this Court by counsel for the Interveners that contributed to and induced the entry of the final decree herein and the denial of a rehearing. In these respects and in addition to their testimony on the issues above stated, Phoenix Finance Corporation proposes to take the depositions of the said John A. Thompson and the said Albert Penn, and by certain of the facts to be adduced by said depositions with supporting proof of all necessary records and documents, to show to the Court that its Decree in this cause and its order denying a rehearing were induced by a misconception and erroneous assumption of the facts shown by the record and by the misrepresentations, misstatements and fraudulent conduct of counsel for the Interveners.

[fol. 320] 9. Phoenix Finance Corporation prays that the Schedule of the proposed testimony of Albert Penn and John A. Thompson, as attached to the Resistance heretofore filed in this cause to the former motions of Iowa-Wisconsin Bridge Company and to which reference is above made and which said Schedules are made a part of this Resistance by reference as aforesaid, and the other facts to which the said John A. Thompson and Albert Penn will testify, as stated herein, be taken and considered as offers of evidence and exhibits in this cause on behalf of Phoenix Finance Corporation, to the same effect as though evidence and exhibits of like tenor and effect were offered at the trial, that this Court shall rule upon the admissibility of said evidence and exhibits and every part thereof in conformity with the rules of evidence and the issues of this cause, and that an exception be granted to Phoenix Finance Corporation with respect to any such evidence or exhibits rejected by Order of this Court.

JAMES R. MORFORD,
HAROLD W. NORMAN,
CASPER SCHENK,
Attorneys for Phoenix Finance Corporation.

State of Delaware,
County of New Castle—ss.

I, James R. Morford, being first duly sworn on oath depose and say that I am one of the attorneys for Phoenix Finance Corporation, and have read the statements contained in the foregoing Resistance to Motion and know the contents thereof and that the statements therein contained are true as I verily believe.

JAMES R. MORFORD.

Subscribed and sworn to before me by the said James R. Morford, this 26th day of February A. D. 1940.

R. M. FITZPATRICK,
(Seal) Notary Public in and for New Castle County.

[fol. 321] Acceptance of Service.

Service of the foregoing Resistance is hereby acknowledged and copies thereof received on this 28th day of February, 1940.

F. A. ONTJES,
W. C. GREEN,
Attorneys for Iowa-Wisconsin Bridge Company.

Filed in the District Court February 29, 1940.

[fol. 322] (Transcript of Shorthand Notes of Hearing on Defendant's Motion Filed February 12, 1940, for Order that Depositions of John A. Thompson and Albert Penn be not Taken; and Resistance of Phoenix Finance Corporation Thereto.)

[fol. 323] Hearing on defendant's motion filed February 12, 1940, for order that depositions of John A. Thompson and Albert Penn be not taken, and resistance of Phoenix Finance Corporation thereto, commenced at 10 o'clock A. M., Tuesday, March 5, 1940, at Sioux City, in the Northern District of Iowa, Western Division, before Hon. Geo. C. Scott, District Judge, the defendant Iowa-Wisconsin Bridge Company appearing by its attorney F. A. Ontjes

of Mason City, Iowa, and the Phoenix Finance Corporation appearing by its attorney Casper Schenk, of Des Moines, Iowa.

Mr. Schenk: Your Honor please, may the reporter be sworn.

(Robert C. Turner was thereupon by the Court duly sworn as the official shorthand reporter of this proceeding.)

Mr. Ontjes: In this case of Equity No. 220, the bridge case, Your Honor, if I may briefly state with respect to our motion; the defendants having served a notice for the taking of the deposition of John A. Thompson and Albert Penn, one in Florida and the other in Chicago, so we have moved under the rules of civil procedure that those depositions be not taken for the reason stated in the motion, and particularly that the witnesses whose depositions are sought to be taken are not in position to give relevant, material or competent evidence in this case; that this case [fol. 324] primarily involves the records heretofore made in this case, and the certified and exemplified copies that will come here of records of actions that they have since started in Delaware, which we claim are violative of the decrees and orders of this court previously made, which of course are also a matter of judicial record to be presented and will not be here by oral testimony, and that oral testimony on such subjects is really not competent; if the depositions were taken the evidence would not be admissible.

Now, we allege here--we allege in the petition in the first place that the—to-wit, in one paragraph of our petition—just one second—we allege in paragraph 9 of our petition—we allege in paragraph 9 of the supplemental bill that John A. Thompson asserted about December 6, 1938, that the litigation in this action was not ended and would not be ended for a good many years. That on the 8th day of July 1939 as president of the Phoenix Finance Corporation said Thompson asserted that one case has been tried in the courts of Delaware in June 1939 and that the thing, referring to the matters involved in this action, were not over, and that there were six cases in the State of Delaware that would be carried on in the course of the next six months.

That is the allegation in the complaint. Now, in the answer, the Phoenix Finance Corporation's answer thereto is [fol. 325] a denial, but admits the last clause, the allegation which is the material part, Phoenix Finance—that is the clause, "and that there are six cases in the State of Delaware that will be carried on in the course of the next few months;" that is admitted in their answer.

Phoenix Finance Corporation attached to its resistance filed February 2, 1940, to motions that certain depositions be not taken, what they claim to be excerpts of the record of proceedings or annual meeting of Class "B" stockholders of the Iowa-Wisconsin Bridge Company on July 8, 1939, as reported by Vernon L. Grant, in which it is asserted among other things, it is said that John A. Thompson stated, "Mr. Ontjes has stated here and he stated in the December meeting that the litigation between the Phoenix and the Bridge Company was over. Now, in the first place there never was any litigation between the Phoenix and the Bridge Company. Now, this indebtedness can be properly presented and evidence can be put in down in the Delaware court. That is now being done. There are six cases down there now that will be carried on through the course of the next few months."

Now, the allegations of the petition and what they claim was said—admit in their answer was said, and what they claim was said, are not of sufficient difference to make any material difference in the testimony. The point of the [fol. 326] litigation is that they are disregarding and intended to disregard the orders of this Court, and it might, except in this record their allegations that they make in their answer, the admissions they make in their allegations, and the allegations made in their former resistance that what they there say did occur, so there won't be any need of taking testimony. The gist of it is that they are disregarding the order of the Court, and that is what their own allegations also say.

They also say something, Your Honor, in their resistance in respect to allegations contained in our supplemental bill as to letters that were sent out by Mr. Thompson. We say in the supplemental bill—make allegation as to what those letters contained that were sent out. They also in their answer,

they say that the letters—admit that the letters were sent out and that they are in substance substantially as alleged. Now, then, in their resistance to the motion depositions be not taken that was heard in Dubuque they attached to the resistance copies of those letters to which they again refer in this resistance, and those letters contain the very thing that we allege that they did contain, so there is no occasion to take depositions on that. We will concede that the letters that they attached to those depositions—to that resistance are the ones that our petition referred to, so we [fol. 327] are not in dispute as to what letters they are.

The fact that the mortgage was made, that is admitted: I mean that they recorded that mortgage. That they have admitted. And that of course also again would be a matter of record proved by certified and exemplified copy from Wisconsin of the filing, and certified copy of the Iowa Recorder filing, would not again be a matter of oral testimony except in so far as they have already admitted.

Now, they say this declaration—the bill contains an allegation that the Bridge Company has not done any business with Phoenix Finance Corporation since July. They say that they have denied that. Well, they don't— in their statement of what they propose to show by these witnesses they don't propose to show that the Bridge Company did do any business with Phoenix Finance System, Inc. There is no such claim, and whether they have or have not would not be material, because the ultimate question is what they are doing with respect to the prosecution of the suits in Delaware, and the recording of this mortgage, that that is robbing the Bridge Company of the fruits of its victory, and it seems to me, Your Honor, that there is nothing that they have set up here for the taking of depositions that would serve any useful purpose in this case.

Mr. Schenk: If Your Honor please, the Phoenix Finance Corporation has set forth in the resistance to the motion [fol. 328] filed by the Iowa-Wisconsin Bridge Company, and we can assure the Court that the testimony which is referred to in that resistance which we expect to secure by taking the depositions of Mr. John A. Thompson and Mr. Albert Penn is as we say it will be. In other words if we can take those depositions we expect to prove every point

which we referred to in this resistance, and in the exhibits which are incorporated therein by reference. This resistance incorporates by reference the schedules of testimony attached to the previous resistance which Your Honor had before you at the last hearing in Dubuque, and we wish the Court to take the resistance, together with the schedules of testimony and exhibits incorporated therein by reference, as a definite and formal tender of the testimony of these two men, Mr. Thompson and Mr. Penn. I shall not go into the details because the resistance covers some pages and is explicit on our position, and we wish to present it to the Court as a definite offer of testimony, of exhibits, and of evidence to be considered by the Court in passing upon the motion not to take the depositions.

The Court: But as in the consideration of the previous motion it is your contention that you are entitled to make the proof tendered because Phoenix was not bound by the final decree in the trial of the case originally?

Mr. Schenk: It is our contention that Phoenix was not [fol. 329] bound in respect to the matters which are now raised in suits started in Delaware, or in respect to the $50,000 mortgage referred to in the supplemental and ancillary bill. In other words we say that upon Mr. Ontjes' application as set forth in the supplemental and ancillary bill we are entitled to make the showing which we now tender, and the testimony and exhibits referred to in our resistance.

The Court: That is all, gentlemen?

Mr. Ontjes: That is all, Your Honor.

The Court: The matter will be submitted.

Mr. Schenk: May I make this inquiry, Your Honor, in the event that Your Honor should hold that any part of this tendered testimony might be taken by deposition, then of course time should be given to Phoenix Finance Corporation to take those depositions, and the hearing upon the merits which has now been set for March 11th we ask to be extended. I dare say the Court will bear that point in mind.

The Court: We will keep the whole situation in mind. This matter will be determined during the day, without doubt.

Mr. Schenk: And may the notes taken by Mr. Turner be filed in the case?

The Court: Yes, it will be so ordered.—Let me suggest that counsel be available during the day.

Mr. Schenk: Yes, sir.

(Record closed.)

[fol. 330] Reporter's Certificate.

I, R. C. Turner, a Certified Shorthand Reporter, residing at Sioux City, in the Northern District of Iowa,

Hereby Certify, That on the 5th day of March, A. D. 1940, at Sioux City, in the Northern District of Iowa, I took down in shorthand, correctly, all proceedings had on the hearing on defendant's motion filed February 12, 1940, for order that depositions of John A. Thompson and Albert Penn be not taken, and resistance of Phoenix Finance Corporation thereto, in the above entitled cause, and have transcribed the same; that the above and foregoing is a true and correct translation of my shorthand notes so taken and transcript of all proceedings had on said above mentioned hearing.

March 5, 1940.

R. C. TURNER.

Filed in the District Court March 6, 1940.

[fol. 331] (Order Directing That Depositions of John A. Thompson and Albert Penn Shall Not Be Taken.)

Be It Remembered that on this 5th day of March, 1940, the motion of the defendant Iowa-Wisconsin Bridge Company, filed February 12, 1940, asking for an order that the depositions of John A. Thompson and Albert Penn be not taken, and in the alternative that the scope of the depositions be limited, and the resistance of the Phoenix Finance Corporation filed February 29, 1940, came on for hearing, F. A. Ontjes appearing for the defendant Iowa-Wisconsin Bridge Company and Casper Schenk appearing for the complainant, Phoenix Finance Corporation;

And the Court having examined said motion and resistance and having heard statements of counsel from which it appears it is proposed to prove by said John A. Thompson and Albert Penn, matters bearing upon the issues that were presented and tried in this cause some years ago;

The only material issues to be considered in the supplemental complaint is the matter of the identity of the subjects presented for litigation in the Delaware Courts, and the mortgage described in the supplemental complaint, with the items considered and determined in this cause, and the identity of these items must be determined from the records. That the depositions in question would not be material, that the witnesses whose testimony is noticed to be taken are incompetent to contravene or overcome the record in this case.

[fol. 332] It is, therefore, Ordered that the depositions of John A. Thompson and Albert Penn shall not be taken.

Done and Ordered this 5th day of March, 1940, at Sioux City, Iowa, for entry in the Eastern Division.

Exceptions reserved to the Phoenix Finance Corporation.

GEO. C. SCOTT,
United States District Judge.

Filed in the District Court March 5, 1940.

[fol. 333] (Transcript of Shorthand Notes of Trial on Supplemental and Ancillary Bill of Iowa-Wisconsin Bridge Company, and Answer of Respondent Phoenix Finance Corporation.)

[fol. 337] And now, to-wit, at one o'clock on this 11th day of March, A. D., 1940, at Sioux City, in the Western Division of Iowa, there came on for trial the issues joined by the supplemental and ancillary bill of complaint, and amendment thereto, of the Iowa-Wisconsin Bridge Company, a corporation, and the answer of the respondent, Phoenix Finance Corporation, thereto, before Hon. Geo. C. Scott, United States District Judge; the complainant appearing by its attorneys, F. A. Ontjes, of Mason City, Iowa, and W. C.

Green, of St. Paul, Minnesota, and the respondent appearing by its attorneys, James R. Morford of Wilmington, Delaware, and Casper Schenk of Des Moines, Iowa.

Thereupon the following proceedings were had:

The Court: How long, gentlemen, will it take to make your record in this case.

Mr. Ontjes: It will not take us very long, Your Honor.

Mr. Morford: I should think it would take at least the afternoon. Of course we have no way of knowing definitely what the Court's rulings will be on certain points, and how much testimony thereafter would be at least tendered.

The Court: The Court has made that very clear heretofore that the testimony will be confined to the identity of the adjudications on the former trial with the items in the Delaware cases.

Mr. Morford: And I assume for the purpose of preserv- [fol. 338] ing our record we should at least make formal tenders of certain proof.

The Court: You can do that of course. Have you got it prepared so you can—

Mr. Morford: Yes, sir.

The Court: Then it is very quickly done.

Mr. Morford: It must be done through the medium of witnesses however.

The Court: How is that.

Mr. Morford: It would be done through the medium of witnesses.

The Court: I will not let you use any witnesses.

Mr. Morford: I realize that, but we would still have to call the witnesses and have them sworn and then state to the Court—

The Court: I do not think so. I will not permit that either.

Mr. Morford: So long as we can preserve our record.

The Court: You can preserve your record all right without any call of witnesses.

Mr. Morford: Very well, sir.

The Court: This matter must be determined on the record of the former trial. I made that clear in the previous rulings. Are you ready to proceed?

Mr. Ontjes: I am, Your Honor.

[fol. 339] The Court: Proceed then with the plaintiff's testimony.

Mr. Morford: We are not ready to proceed now, sir. This trial is fixed for two o'clock, as I understood it, and our witnesses and records are at the hotel. We were called down by Mr. McNeely for a conference.

The Court: Well, if that is the attitude why we will wait until two o'clock.

Mr. Morford: It is not necessary to wait until two o'clock, but it is necessary to wait until we bring our records down from the hotel where they were. We had no notice of what Your Honor intended when you sent for us.

The Court: Well, we will wait until two o'clock then.

Mr. Morford: Will it be here or in the court room?

The Court: It will be right here.

Mr. Morford: All right, sir.

(1:40 o'clock P. M., March 11, 1940.)

The Court: Now, gentlemen, this corner being much warmer and less drafty than my usual chair, I am going to request that you forego formalities and let me remain over here.

Mr. Ontjes: That is all right; splendid idea, Your Honor.

Mr. Morford: I might say to Your Honor, it being now 1:40, that the defendant is ready to proceed.

[fol. 340] The Court: Proceed then.

Mr. Ontjes: Our side should proceed first.

Mr. Morford: I wanted to report to the Court that we were ready. I last stated that we were not ready.

Mr. Ontjes: If your Honor please, we want to ask Your Honor to take judicial notice of all the pleadings filed in this case, and all the depositions taken, and all the evidence taken, and the transcripts of such evidence, and of the Master's report, and of the exceptions filed to such report, and the opinion, order and decree of this Court made with respect to the exceptions to the Master's report, and final decree in this cause; also the application or petition for rehearing filed by Phoenix Finance Corporation, and the supplemental opinion and order of this Court with respect to that.

And we ask the Court, that, without exception, to take judicial notice of all the records, papers and files in this cause in connection herewith.

And we also offer in evidence all of them, and we want to offer in addition in evidence—I suppose the Court take judicial notice that that is the opinion of the Circuit Court of Appeals in this particular cause as reported in 98 Federal, 2nd Series, page 416.

And, if Your Honor please, we now offer—Maybe the [fol. 341] reporter should mark these as exhibits.

Mr. Morford: Should I perhaps make some comment with respect to each such offer?

Mr. Ontjes: Mr. Green calls my attention: and also take judicial notice of the mandate of the Circuit Court of Appeals that is now on file here in this cause.

Mr. Morford: Before making any comment on the offer of evidence may I ask that the reporter be sworn in this case so he will have an official status?

(Robert C. Turner was thereupon duly sworn by the Clerk as the official shorthand reporter of this proceeding.)

Mr. Morford: Mr. Ontjes has made certain offers of the records of this case. A few days ago my associate, Mr. Schenk, requested Your Honor that all the original records in this cause be transferred from Dubuque to Sioux City for this particular hearing. I understand that Your Honor denied that request. May it so appear?

The Court: No, it may not so appear. The records are all here. The request was that I would take the responsibility of having brought them here by truck.

Mr. Morford: I understand that the records then are all here and are available for use by either side?

The Court: Yes.

Mr. Morford: Mr. Ontjes has offered in evidence, as [fol. 342] I understand it, these records physically. At the outset I understood him to say that the Court should take judicial notice of those records. As to that we would of course have no objection. We do object to the records being offered in evidence and physically admitted as exhibits in this hearing because we feel that that is not necessary. We think that the Court may and should take judicial notice of anything which constitutes a part of the record in this cause without the necessity of tendering those exhibits in evidence, and you will realize how burdensome it would be to the defendant if on an appeal in this case it would become necessary to have all of those records printed all over again. They have already been printed once, and I should think that the physical offering of those records now is not necessary. We therefore object to that.

The Court: I don't really see the distinction. If the Court is to take judicial notice of the entire record then it is in evidence.

Mr. Morford: It is already in evidence, such parts as are already in evidence are there.

The Court: Yes, I so understand.

Mr. Morford: And no further offer would be necessary.

The Court: No, I don't think any further offer would be necessary, but I don't see that the double offer is prej- [fol. 343] udicial. It does not really change the situation as far as I can see.

Mr. Morford: I would regret it very much, Sir, if we would have to print them all over again.

The Court: You would not have to print more than was necessary to meet the issue in this supplemental complaint,

and that is only those parts of the record that bear upon the identity of the items adjudicated and now pending in the courts of Delaware.

Mr. Morford: May I suggest that we merely stipulate that both sides in this case before Your Honor shall have the right to refer to any exhibit of record in this cause which has been admitted in evidence in this cause, without the necessity of a formal tender. I believe that will simplify the record considerably if you will so stipulate.

Mr. Ontjes: Well, I would sooner just let the record stand in the case.

Mr. Morford: Perhaps it is because I am not familiar with your practice. Do I understand that the papers now offered are exhibits in the case without any—

Mr. Ontjes: These that I am now starting to offer are the certified and exemplified copies of the Delaware suit.

Mr. Morford: You will offer them?

Mr. Ontjes: I will offer those formally, yes.

[fol. 344] Mr. Morford: May I suggest that in view of the many numbers and letters that have been used heretofore that we refer to these exhibits as S. C.-1, 2, and 3, and so on, to distinguish them from letters and numbers that appear in this case.

The Court: What would that S. C. indicate?

Mr. Morford: Sioux City; or some other designation, I don't care what it is.

(Exhibit "SC-1", Certified and exemplified copies of files in cause No. 39, Superior Court of New Castle County, Delaware;

(Exhibit "SC-2", Exemplified copy Bill of Complaint, Phoenix Finance Corporation vs. Iowa-Wisconsin Bridge Company; Court of Chancery, New Castle County, Delaware;

(Exhibit "SC-3", Exemplified copy of files in cause No. 65, Superior Court of New Castle County, Delaware;

(Exhibit "SC-4", Exemplified copy of files in cause No. 64, Superior Court of New Castle County, Delaware;

(Exhibit "SC-5", Exemplified copy of files in cause No. 79, Superior Court of New Castle County, Delaware;

(Exhibit "SC-6", Certified copy of mortgage, Iowa-Wisconsin Bridge Company to Phoenix Corporation, recorded in Allamakee County, Iowa;

(Exhibit "SC-7", Exemplified copy of mortgage, Iowa-Wisconsin Bridge Company to Phoenix Finance Corpora-
[fol. 345] tion, recorded in Crawford County, Wisconsin:

marked for the complainant Iowa-Wisconsin Bridge Company.)

Mr. Morford: Before this new group of documents is presented to the Court and offered in evidence I would like to know whether or not the Court proposes to rule upon the other records that were offered generally in evidence a few moments ago, and in order that the Court may have before it clearly what that offer comprehended I would like to have the reporter read Mr. Ontjes' statement as to what he did offer, because I would like to know certainly by the time I complete this hearing what is in evidence and what is not.

(As requested the record was read by the reporter, commencing with line 6 on page 6 of this transcript, to and including line 6 on page 7 of this transcript.)

Mr. Morford: As I stated, Your Honor, I have no objection to the Court taking judicial notice of any record constituting a part of the pleadings or evidence admitted in this cause. I did state an objection to the admission of any of those records in evidence, and I did not understand whether the Court had ruled and ordered they were or were not in evidence.

The Court: Your objection is to the admission of any of those matters?

Mr. Morford: Yes.

[fol. 346] The Court: Then that would be overruled. I do think, however, that the offer should be confined to such parts of the record as pertain to the subjects of the Delaware suits.

Mr. Morford: It would be much easier, of course, for me to state specific objections if the offer were more specific, and I think it should be specific as to what papers are so offered, because there are certain documents to which I would want to make a specific objection, and I cannot address myself to any such specific objections unless there is a specific offer.

At this point is there anything in evidence on behalf of the plaintiff? Perhaps it is my unfamiliarity with your practice, but I would like to know whether there is any exhibit in evidence on behalf of the plaintiff?

The Court: I think they are all in evidence. If the Court is to take judicial notice of them all, and you both agree that the Court should do so, I think that puts them in evidence.

Mr. Morford: Very well, sir. Now, may I have an exception to Your Honor's ruling on that?

The Court: It is wholly unnecessary. The exceptions are abolished under the rules of civil procedure.

Mr. Morford: May I direct Your Honor's attention to one particular document which may be considered in evi- [fol. 347] dence in this cause under the wholesale tender and the ruling of the Court, and that is the deposition of John A. Thompson taken at Des Moines, Iowa. That deposition, sir, was not offered in evidence in whole or in part in this cause. Mr. Thompson was present and testified as a witness, being called as a witness on behalf of the intervener. Accordingly his deposition could not have been used in any event in view of the fact that he was present unless it were used for the purpose of contradicting his testimony. There was no such contradiction. There was no such offer for the purpose of contradiction. There was no offer of the deposition itself. And there was no ruling by the Master or by the Court admitting that deposition in evidence. Your Honor, at the time an application was made with respect to the printing of certain records for the Circuit Court of Appeals, said that the deposition might be printed for the purpose of the consideration of the issue as to whether the lower court abused its discretion in denying the petition for rehearing, but for no other

purpose, so that deposition is not a part of Your Honor's record in this cause, and we do object specifically to that deposition and ask that it be stricken from the records in this cause.

Mr. Ontjes: Mr. Morford don't have in mind, Your Honor, all the record in this cause. Mr. Thompson's deposition was taken in Des Moines. Subsequently at the trial [fol. 348] he was a witness on the part of the defendant and there were certain questions and answers asked of him as to his testimony on the former deposition, whether he didn't so testify thus and so. Upon not admitting that, those portions were offered in evidence. Subsequently in this trial they made application for a petition for rehearing and claimed that they had been wholly—that they hadn't—that many of these matters they had known about and the question—we at that time filed a resistance to their petition for rehearing and making Mr. John A. Thompson's deposition as a part of our resistance to the petition for rehearing, and then they appealed from the order of the Court denying the rehearing in the Circuit Court of Appeals. We asked Your Honor that the deposition be published—printed as part of the resistance to their petition for rehearing, and the Court so ordered.

Mr. Morford: But for no other purpose, and I would be very glad if Mr. Ontjes would point out anywhere in the record where this deposition or any part of it was offered in evidence in this case. Mr. Ontjes has just made that assertion and I would like him to point out where it was offered in evidence because I have made the assertion to Your Honor that it was not offered.

Mr. Ontjes: If you will read the transcript, Mr. Morford, if you will read the transcript in the trial you will [fol. 349] find that at certain points certain specific questions with respect to his testimony on the deposition were called to Mr. Thompson's attention, and that those certain parts of the deposition were offered in evidence. I am not saying that the deposition as a whole was offered in evidence, but those certain parts were offered.

Mr. Morford: Now, can you show where any part of the deposition was offered in evidence?

Mr. Ontjes: Not without the transcript, Mr. Morford. You have a copy of that, do you not?

Mr. Morford: Will you admit then, Mr. Ontjes, that the whole deposition was not offered in evidence, your contention being that only certain parts of it were offered?

Mr. Ontjes: Certain parts of it were offered in evidence.

Mr. Morford: Then even on that admission—

Mr. Ontjes: And subsequently on the matter relating to the petition for rehearing we incorporated it as a part of our resistance, making the whole thing in evidence then before the Court on that question, so I think that it is in this case.

Mr. Morford: The Court said it was only admitted for that purpose solely, and I move you, sir, that that deposition be excluded and specifically that it be stricken from the records in this cause.

[fol. 350] The Court: Overruled.

Mr. Morford: It is understood of course, as Your Honor pointed out a moment ago, that specific exceptions are no longer necessary.

Offer: Mr. Ontjes: We offer in evidence Exhibit "SC-1", certified and exemplified copy of the Delaware court of the summons and declaration in cause 39 described in the supplemental and ancillary bill herein.

Mr. Morford: In which paragraph of the supplemental and ancillary bill?

Mr. Ontjes: It is on 7-A.

Mr. Morford: 7-A. And that is the suit relating to what general subject; the $2000 note and the $3125 note, isn't it?

Mr. Ontjes: I think so, yes.

Mr. Morford: This is objected to, if the Court pleases, this is an exemplification only of the summons and declaration in the cause referred to; it does not show the appearance on behalf of the defendant Iowa-Wisconsin Bridge Company; it does not show the pleas filed by Iowa-Wisconsin Bridge Company, including specifically the plea of res

adjudicata, which raised the issue as to the effect of Your Honor's adjudication in the former suit; it does not show that that cause was tried upon its merits before the Court, briefed, argued, and is now pending decision. In other [fol. 351] words the record offered is not a complete exemplified record of that proceeding as the same exists today, or within a reasonable period of today.

The Court: Overruled.

Offer: Mr. Ontjes: We offer in evidence Exhibit "SC-2", being the bill of complaint filed in the Chancery Court of Delaware described in paragraph—and refers to the action described in paragraph 7-B of the supplemental and ancillary bill herein, and which relates to the 517 shares of stock.

Mr. Morford: This is objected to for the reason that the exemplification offer includes only the bill of complaint, it does not show the subpoena issued on the bill of complaint, the service on the defendant, the general appearance by solicitors on behalf of the defendant, the answer filed by the defendant raising the objection of res adjudicata, and referring particularly to the adjudication of Your Honor in this cause, and it does not show the present status of that cause as now pending in the Court of Chancery in the State of Delaware.

The Court: Overruled.

Offer: Mr. Ontjes: We offer in evidence Exhibit "SC-3", being the summons, affidavit of demand and writ, together with narr, in cause No. 65 described in the supplemental [fol. 352] and ancillary bill of the defendant herein in paragraph 7-C of that bill.

Mr. Morford: What is that case about? That is objected to for the reason that it is incomplete, it does not show the appearance generally on behalf of the defendant, the defendant's pleas, including pleas of res adjudicata, or replications and present status of that proceeding.

The Court: Same ruling. Overruled.

Offer: Mr. Ontjes: We offer in evidence Exhibit "SC-4", being the summons, certified exemplified copy of summons and declaration in the Delaware suit described in paragraph

7-D of the supplemental and ancillary bill herein, being known as suit No. 64 pending in the Superior Court of Delaware.

Mr. Morford: That is objected to because the exemplification is an incomplete record of that cause, and as offered consists only of the writ and declaration, there being omitted therefrom entirely the pleas of the defendant, which shows that the defendant pleaded res adjudicate in that cause, the appearance of the defendant showing a general appearance by attorneys for the defendant, the replications of the cause, and does not show the present status thereof.

The Court: Overruled. Is there any objection where the objection interposed is identical with one just preceding—can't that be shortened without repetition?

[fol. 353] Mr. Morford: I will try to do so, sir.

Offer: Mr. Ontjes: We offer in evidence Exhiibt "SC-5", being a certified exemplified copy of summons affidavit, of demand, and writ with narr, filed in the case 79 in the Superior Court of Delaware, and referred to and described in the supplemental and ancillary bill in paragraph 7-E.

Mr. Morford: Objected to for the same reasons heretofore stated with respect to the last offer.

The Court: And the same ruling.

Offer: Mr. Ontjes: We offer in evidence Exhibit "SC-6", being a certified copy of mortgage referred to in the Supplemental and ancillary bill as having been caused to be filed or recorded by the Phoenix Finance Corporation in Allamakee County, in the State of Iowa, in the Recorder's office, Allamakee County, State of Iowa.

Mr. Morford: The paper offered is a copy, and in order that we may not take time at this moment may we have the opportunity to check the paper offered for accuracy?

The Court: Certainly.

Mr. Morford: May it also be stipulated that this same mortgage is recorded in Crawford County, Wisconsin,

where a large part of the property subject to the mortgage is located?

[fol. 354] Mr. Ontjes: I am just about to offer, Mr. Morford, as the next paper the certified exemplified copy of that mortgage as recorded in Crawford County, Wisconsin.

Mr. Morford: Very well, then, as to the offer of Exhibit "SC-6" we have no objection subject to checking the paper for accuracy.

Offer: Mr. Ontjes: We offer in evidence Exhibit "SC-7", being a certified exemplified copy of the same mortgage recorded in the office of the Registrar of Deeds of Crawford County, Wisconsin.

Mr. Morford: Subject to our ability to check the paper offered for accuracy we have no objection.

Mr. Ontjes: We want to offer a portion from the resistance of defendants that they presented at Dubuque with respect to the application for an order that depositions be not taken, first, it is alleged in paragraph 9 of the supplemental and ancillary bill that Mr. Thompson made certain assertions at certain stockholders' meetings with respect to the litigation. The answer admits this part, it is said "that there were six cases in the State of Delaware that would be carried on in the course of the next few months."

Now, in their resistance I want to simply put in a few [fol. 355] statements of what they claim in their resistance. He said, "Mr. Ontjes has stated here and he stated in the December meeting, that the litigation between Phoenix and the Bridge Company was all over. Now, in the first place there never was any litigation between Phoenix and the Bridge Company."

That is on page 2 of their resistance.

(Reporters' note: The above quotation is from page 2 of the schedule of testimony of John A. Thompson, rather than page 2 of the resistance itself.)

Mr. Ontjes: And on the top of page 6 of the same resistance:

(Likewise the following quotation is from page 6 of the schedule of testimony of John A. Thompson attached to the resistance, and not the resistance itself.)

"Now, this indebtedness can be properly presented and evidence can be put down in the Delaware court. That is now being done. There are six cases down there now that will be carried on through the courts in the next few months, the one I have just described was heard—it is all finished except the decision of the court, perhaps a brief due on the 13th, and a decision of the court, which they promise by the first of August, and five others to follow."

We have alleged, Your Honor, in the bill of complaint, supplemental and ancillary bill we allege that Mr. Thomp-[fol. 356] son sent letters—he wrote certain letters to stockholders and to directors, one of those being as of November 23, 1939. In our bill of complaint we allege that Mr. Thompson wrote:

"I am not asking you or any other man to help me or to help Phoenix. Phoenix does not need any help— "

The Court: Mr. Ontjes, what is the purpose of reading this now?

Mr. Ontjes: I am simply going to offer from their own letters, Your Honor.

The Court: Make your offer.

Mr. Ontjes: All right, I will offer—

Mr. Morford: May I suggest that we may consider that the resistance, the two resistances filed by Phoenix Finance Corporation in this case are evidence, constitute evidence in this case for either party, together with all schedules and exhibits attached thereto?

Mr. Ontjes: Oh, no, no, no.

Mr. Morford: I think they are part of the record of the case in any event, and an offer would not be necessary.

Mr. Ontjes: We are not agreeing to that which you set up in your schedules that it is all evidence.

Mr. Morford: I don't see where you can offer a part of it without them all going in.

Offer: Mr. Ontjes: We offer in evidence the letter marked "Exhibit "A", dated November 23, 1938, attached

[fol. 357] to the resistance of Phoenix Finance Company's resistance.

The Court: What is the purpose of the offer, Mr. Ontjes?

Mr. Ontjes: Why, the purpose of those offers, Your Honor, and the reasons for the allegations in the bill with respect to these letters was principally as showing that the defendant did not intend to carry out the orders of this court, that is the purpose of it. That is all there is to it.

Offer: Mr. Ontjes: Then we offer in evidence Exhibit "B", which is a letter dated June 12, 1939, attached to the same resistance.

Mr. Morford: The letters referred to are a part of the record in this cause. We do not think an offer of those papers in evidence is necessary at this time.

The Court: Well, the fact that they may be offered, if they are already in it does not make the offer prejudicial.

Mr. Morford: I think that would be the position.

Mr. Ontjes: I think, Your Honor, that that completes the evidence on the part of the complainant.

The Court: Evidence on the part of the defense.

Mr. Ontjes: I might say, Your Honor, that when we drew the bill of complaint, drew the supplemental and ancillary bill, we did not then know that they had also recorded that mortgage in Crawford County, Wisconsin, but [fol. 358] of course the bill contains a general prayer for relief, so I don't think that in order to ask for discharge of the mortgage in both places would require an amendment, because there is a general prayer for relief.

Mr. Morford: If Your Honor pleases, I am still somewhat troubled in that I do not know just what has been put in evidence on behalf of the plaintiff in the general offer made at its opening, and in that connection I would point out to Your Honor as I have been advised that there are among the papers and documents in Mr. McNeely's possession as Clerk in this particular case over one hundred separate papers of various kinds that were never offered in evidence in this case, and there is not a scintilla of a rec-

ord to support their admissibility. Now, are we to be faced in this or any subsequent proceeding in this cause, Your Honor is now hearing, with such documents, documents that were never offered, never have been offered?

The Court: You will not be faced with anything that is not a part of the record of the previous trial.

Mr. Morford: I would like the privilege of making a rather short opening statement to Your Honor in order that our position may be clear, and I think that perhaps will enable all parties to proceed much more rapidly.

The Court: Proceed.

[fol. 359] Respondent's Evidence.

Mr. Morford: A very substantial portion of the evidence on behalf of Phoenix Finance Corporation is the evidence shown by the schedules of testimony of John A. Thompson, Albert Penn, Lee J. Skoner, George Preuss, and Edgar S. Gage, with the exhibits attached to those schedules, and which schedules and exhibits are attached to the resistance and are made a part of the resistance of Phoenix Finance Corporation filed in this cause.

Your Honor denied the right of Phoenix Finance Corporation to take the depositions of those witnesses, and Your Honor's ruling in that respect is quite clear, to which there has of course been preserved a proper exception. Two of those witnesses, Gage and Preuss are not available for the hearing today. They live more than a hundred miles from Sioux City; they cannot be produced, and they are not subject to subpoena. Therefore as to those witnesses we stand entirely upon the record of our attempt to take their depositions and Your Honor's denial of that right.

With respect to the witnesses John A. Thompson, Albert Penn, and Lee J. Skoner, these three persons are available in person at this trial. They are here now. We desire to call each one of those witnesses, have each such witness sworn, and to have each witness testify to the same facts that are stated in the respective schedules of testimony [fol. 360] attached to the resistance.

Another point in connection with the position of Phoenix Finance Corporation is this: Your Honor has stricken from the record a large part of the answer and counterclaim of Phoenix Finance Corporation, and you have stricken from the record the allegations—particular allegations relating to charges of fraud and deception practiced upon the court as alleged, which induced Your Honor's opinion below, as was charged. Now, we take the position, Your Honor, that that is not a matter which requires pleading, and even though Your Honor may have stricken allegations to that effect from the answer the legal situation nevertheless is that if any party to a cause at any time can direct to the attention of the court circumstances of fraud and deception that have been practiced upon the court, the court will, on the application of any party, or perhaps on its own motion, review its findings for the purpose of ascertaining any irregularities which may have occurred as a result of fraud. That is an application of the principle announced by Lord Reasdale many years ago, the Lord Readsdale rule which was argued and briefed at an earlier stage of this same proceeding, and with which Your Honor is no doubt familiar. So we propose at this time to offer ev[illegible]ot for the purpose of amending the record, but for the purpose of showing the facts with respect to certain findings of fact, both of the Master and of the Court. They are findings of fact [fol. 361] in which we earnestly contend there is nothing in the record of this case to support them; that your Honor was imposed upon by assertions contained in the briefs, motions and oral arguments of the attorneys for the Bridge Company, and that the actual facts are not only not shown by the record, but are diametrically opposed to what those findings are.

For the purpose of pointing out those circumstances of fraud, and in showing clearly the application of Lord Readsdale's rule, we propose to offer certain evidence in connection with our allegations of fraud and deception of course in addition thereto, but this is more a legal than a factual argument. We direct Your Honor's attention to Section 265 of the federal judicial code, which provides that the writ of injunction—I am quoting—

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state except in cases where injunction may be authorized by any law relating to proceedings in bankruptcy."

And we refer particularly to the most recent adjudication of the Supreme Court of the United States on that point as contained in the case of Oklahoma Packing Company vs. Oklahoma Gas & Electric Company, et al., decision of January 15, 1940. My citation is in 84 Lawyers [fol. 362] Edition, page 329, advance sheet No. 6, in which the Supreme Court held in line with many earlier decisions that where a court enjoins a party from proceeding with an action in another jurisdiction it is exactly the same thing as though the court were purporting to enjoin the court itself, and that that may not be done.

It is our purpose of course to show that in each one of the cases in Delaware that are sought to be enjoined in this proceeding, the defendant has available [and] adequate legal and equitable defense, namely, the defense of res adjudicata which has been raised, pleaded, and in at least two of those cases argued, briefed, and is now under advisement by the court. When Mr. Ontjes offered in evidence certain records with respect to the six actions pending in the State of Delaware, five in the Superior Court, and one in the Court of Chancery, I objected to each document as presented because it was not complete. I now desire to have the reporter mark exemplified records of each of these proceedings with an appropriate notation, and to offer the exemplified records in evidence on behalf of the defendant.

(Exhibit "SC-101", Exemplified court files, cause No. 39, Superior Court of New Castle County, Delaware:

(Exhibit "SC-102", Exemplified court files, cause entitled Phoenix Finance Corporation vs. Iowa-Wisconsin Bridge Company, Court of Chancery, State of Delaware.

[fol. 363] (Exhibit "SC-103", Exemplified court files, cause No. 65, Phoenix Finance Corporation vs. Iowa-Wisconsin Bridge Company, Superior Court, State of Delaware, New Castle County;

(Exhibit "SC-104", Exemplified court files, cause No. 64, Phoenix Finance Corporation vs. Iowa-Wisconsin Bridge Company, Superior Court, State of Delaware, New Castle County;

(Exhibit "SC-105", Exemplified court files, cause No. 79, Phoenix Finance Corporation vs. Iowa-Wisconsin Bridge Company, Superior Court, State of Delaware, New Castle County:

marked for the respondent.)

Offer: Mr. Morford: I now offer in evidence Exhibits "SC-101", "SC-102", "SC-103", "SC-104", and "SC-105", the same being the complete exemplified copies of the records and docket entries in the same proceedings referred to in the plaintiff's offers "SC-1", "SC-2", "SC-3", "SC-4" and "SC-5". Is there any objection? Are these objected to?

Mr. Ontjes: No objection, no.

Mr. Morford: I would call Your Honor's attention to the fact that there is a certain cause of action alleged in the bill of complaint in paragraph 7-F thereof which we commonly speak of as the bridge toll ticket case, and which would be the sixth Delaware action, in connection with [fol. 364] which the plaintiff has not seen fit to offer any evidence, and which is not covered by the preliminary restraining order in this case. Is it proper to assume that it is out of the case?

The Court: I so understand it.

Mr. Ontjes: That is correct, Your Honor, that is out of the case; preliminary injunction did not apply to it and we are not pressing it any further; the Court didn't grant the injunction on that.

Mr. Morford: Very well.

Mr. Morford: I would like to call John A. Thompson as a witness and have him sworn in this case.

The Court: For what purpose?

Mr. Morford: In connection with Mr. Thompson's testimony I desire to show the following: In the first place I wish to—

The Court: You may state briefly the character of the testimony you desire to offer without going into a recitation of the testimony.

Mr. Morford: In the first place I desire to make formal tender through John A. Thompson of all of the facts contained in the schedule of the testimony of John A. Thompson filed as an exhibit and schedule to the resistance of Phoenix Finance Corporation in this cause. With respect to those facts Your Honor refused Phoenix Finance Cor- [fol. 365] poration the privilege of taking Mr. Thompson's deposition. We desire to offer his evidence with respect to those same facts, and all of those same facts, each and every part of his schedule of testimony.

In addition we desire to offer the testimony of John A. Thompson to show that Phoenix Finance Corporation at all times complied with the order of Judge Molyneaux entered in this cause under date of April 24, 1934, and appearing in the printed record on pages 97 and 98, which order reads as follows: and I quote:

"Ordered that the defendant Phoenix Finance Corporation produce at its office in Des Moines, Iowa, all its books and records appertaining to the business and affairs of Iowa-Wisconsin Bridge Company, within ten days from the date of this order, and submit them to the inspection of the intervener and his counsel and accountant."

In Your Honor's opinion dated March 4, 1937, as the same appears in the printed record, pages 410 to 413, Your Honor stated, and I quote:

"The interveners obtained an order of court for the production of the books and records—"

The Court: I don't think that we should take the time to read these matters into the record. You have sufficiently identified the subject upon which you desire to offer the testimony I would think.

[fol. 366] Mr. Morford: Yes. In connection with that I can merely add that in view of the fact that Your Honor

denied the petition for rehearing upon that ground we believe that we are entitled to show that there was at all times full and complete compliance by Phoenix Finance Corporation with the order of this court, and that assertion of fact which must have been taken by Your Honor from the various briefs and oral arguments of counsel, is not in accordance with the fact, and is not supported by the record. In other words, I do not want to take the position or have Your Honor think I am taking the position that I am saying Your Honor was wrong in a certain finding and therefore you should correct it. That is not my point. I say Your Honor made a certain finding of fact, and there is nothing in the record to support that finding of fact, and that the fact is the contrary, that Your Honor was imposed upon by fraud and misrepresentation on the part of counsel. We desire to direct Your Honor's attention to that fraud and to that end offer testimony to show that fact.

The Court: Is that your offer?

Mr. Morford: There is more, Your Honor. We desire further to have Mr. Thompson testify to the same facts as are contained in his affidavits filed in connection with the petition for rehearing of Phoenix Finance Corporation, the affidavits being found in the printed record at pages 230 [fol. 367] and 355, and if Mr. Thompson is permitted to testify he will testify to the same effect as stated in those affidavits.

We further desire to offer testimony by Mr. Thompson to show that Phoenix Finance Corporation at no time in this case had an opportunity to offer evidence on its behalf, although it at all times was ready, willing and desirous of so doing. Your Honor held in this case that the trustees had exclusive control of the litigation. Mr. Rex Fowler was the attorney for the trustees. We propose to show through Mr. Thompson that he was told by Mr. Fowler that the time had not come for Phoenix to take any part in the proceedings, that the evidence offered against Phoenix by the interveners was premature and not necessary; that there had been a prima facie showing of consideration for the bonds, and that at that time it was not necessary for

Phoenix Finance Corporation to rebut any of the evidence so offered.

We desire to prove through Mr. Thompson that Phoenix Finance Corporation had its witnesses physically present on one or more days at the hearing before the Master to testify, ready to testify on all of the issues which are now being asserted against it, and that Mr. Fowler, the attorney for the trustees, who had control of the litigation, stated it was not necessary at that stage of the proceeding.

In that connection we desire to offer, after proof of the same by Mr. Thompson, a letter from Rex Fowler to Mr. [fol. 368] J. W. Kindig, the Special Master in this cause, dated July 25, 1935, which I will ask the reporter to mark as Exhibit "SC-106".

(Exhibit "SC-106", Letter dated July 25, 1935, Rex Fowler to J. W. Kindig, marked for the respondent.)

Mr. Morford: With respect to the $50,000 mortgage, the record of which has been offered in evidence by the plaintiff, we desire to prove by Mr. Thompson particularly that Phoenix Finance Corporation at no time was given the opportunity, in fact that it was denied the opportunity, to present evidence to prove the consideration for that $50,000 mortgage, and to prove the affirmative of the proposition that the Bridge Company did actually receive the consideration for that mortgage in the form of two checks of $35,000 and $15,000 respectively.

I desire through Mr. Thompson to point out to the Court that those two checks were not offered in evidence in this case, are not a part of the record in this case, and through Mr. Thompson's identification to offer those checks in evidence. I am informed that those checks are physically in the possession of the Clerk somewhere among the records so we cannot physically have them marked at the moment, but they are not identified by exhibit numbers on the record, and we desire to make a record and a formal tender of those checks as evidence.

[fol. 369] In connection with the consideration for the $50,000 mortgage we desire to offer in evidence the following records:

First, the minutes of the Board of Directors of Iowa-Wisconsin Bridge Company, dated March 11, 1931.

Second, the minutes of the Board of Directors of Iowa-Wisconsin Bridge Company, dated November 10, 1931.

Third, the minutes of the Board of Directors of Iowa-Wisconsin Bridge Company, dated December 22, 1931.

Fourth, the minutes of the Board of Directors of Iowa-Wisconsin Bridge Company,—

Mr. Ontjes: Are you now trying to recite into this record something new, or something that is in the record? The minutes are in the record.

Mr. Morford: I am making an offer of evidence.

The minutes of the Board of Directors of Iowa-Wisconsin Bridge Company, dated March 7, 1932.

Fifth, Stockholders' meeting of the same company on March 10, 1931.

Sixth, the stockholders' meeting, Iowa-Wisconsin Bridge Company of December 22, 1932.

In connection with Mr. Thompson's testimony we also desire—

Mr. Ontjes: Have you now made an offer, did I understand you, Mr. Morford? You keep right on talking. I [fol. 370] don't quite understand. Are you making offers or what are you doing? If you are making an offer I am going to object to it.

Mr. Morford: I will make my formal offer Mr. Ontjes after I have completed my statement as to what we intend to prove by Mr. Thompson.

Mr. Ontjes: You have thus far made no offer then?

Mr. Morford: I have thus far made no offer, that is correct.

In connection with Mr. Thompson's testimony I desire to identify and offer in evidence a letter dated March 15, 1932, from Iowa-Wisconsin Bridge Company to Phoenix Finance System, Incorporated, which I will ask the report-

er to mark—a copy of that letter I ask the reporter to mark as Exhibit "SC-107".

(Exhibit "SC-107", Copy of letter dated March 15, 1932, from Iowa-Wisconsin Bridge Company to Phoenix Fiance System, marked for the respondent).

Mr. Morford: In connection with Mr. Thompson's testimony I also propose to identify and offer in evidence letter of Phoenix Finance System, Inc., to Iowa-Wisconsin Bridge Company, dated March 15, 1932, a copy of which is marked by the reporter as Exhibit "SC-108".

(Exhibit "SC-108", Copy of letter dated March 15, 1932, from Phoenix Finance System to Iowa-Wisconsin Bridge [fol. 371] Company, marked for the respondent.)

Mr. Morford: In connection with these last two exhibits, when I offer the same in evidence formally I will present to the attorney for the plaintiff the original of each such letter and ask to substitute the copy as the exhibit. I will come back to that in a moment.

In connection with Mr. Thompson's testimony we desire to identify and prove letter of Iowa-Wisconsin Bridge Company to Standard Shares Holding Company, dated March 11, 1931, with the acceptance of Standard Shares Holding Company noted at the bottom thereof, and with the resolution of the Board of Directors of Standard Shares Holding Company attached thereto. I am asking the reporter to mark the copy of the original of that letter as Exhibit "SC-109".

(Exhibit "SC-109", Copy of letter dated March 11, 1931, Iowa-Wisconsin Bridge Company to Standard Shares Holding Company, marked for the respondent.)

Mr. Morford: And while I will offer the original of that letter in evidence I will ask that the copy as so marked be substituted for the original. May I just hand these to you in a moment Mr. Ontjes? I will come back to them very shortly.

In further connection with the $50,000 mortgage we desire to prove through Mr. Thompson a further advancement by Phoenix Finance System to and for the account [fol. 372] of the Bridge Company of the sum of $9000,

under date of November 10, 1931, a sum of money which was used for paying a lienor on the bridge, namely, Kremer & Hog.

In that connection we would direct Your Honor's attention to the terms of the mortgage itself which is in evidence in this case, in which the Bridge Company gave to Phoenix Finance System the power as attorney-in-fact for the Bridge Company to "pay all liens of any kind. whether prior or subsequent, that may in any manner affect the title to the lands", and, later, "and for the repayment of all monies so paid, together with interest thereon at the rate of eight per cent per annum, payable semi-annually, this indenture shall be like security in like manner—"

The Court: Now, Mr. Morford, we might as well get to a showdown on this. I am not going to let all this go into the record here. You are perfectly entitled to identify and indicate to the Court what you want to prove.

Mr. Morford: That is what I am trying to do, Your Honor.

The Court: But not to go on and prove it. We are not going to accept detailed and lengthy evidence here that you want to put in. All I want you to do is to indicate and identify what you want to prove.

Mr. Morford: When I stated to Your Honor that propose to prove through Mr. Thompson the advancemen [fol. 373] of $9000 on or about November 10, 1931, if made that bare assertion it would have no meaning unles I explain to you just why we desired to offer it, and all I have done is to read a portion from the mortgage which is an exhibit in this case. I had read a portion of the applicable part of that mortgage; there was I believe but another sentence. If Your Honor will permit me I would like to complete that.

The Court: Proceed to the end, but let us not take too much time to these matters, because it is evident that it all proceeds upon an attack on the original adjudication.

Mr. Morford: The mortgage which is in evidence in this case is Exhibits "SC-6" and "SC-7", and it provides that the Phoenix Finance System shall have power as at-

torney-in-fact for the Bridge Company to "pay all liens of any kind, whether prior or subsequent, that may in any manner affect the title to the lands."

At another point it is provided by these same instruments that "for the repayment of all monies so paid, together with interest thereon at the rate of eight per cent per annum, payable semi-annually, this indenture shall be like security in like manner and with like effect as for the payment of said note."

We propose to prove, to offer the testimony of Mr. Thompson to the effect that Kremer & Hog had a mechanic's lien on the bridge; that this money was advanced [fol. 374] by Phoenix Finance System for the purpose of paying that lien, and for the purpose of showing that this mortgage is for a principal sum of $59,000 instead of $50,000, as it reads upon the face thereof.

We also desire through the testimony of John A. Thompson to offer evidence with respect to the alleged control of Thompson and the so-called Thompson companies of the Iowa-Wisconsin Bridge Company and of the Board of Directors, and to this end we will offer the testimony of John A. Thompson to the effect that Phoenix Finance Corporation, or any predecessor in interest, or associate, or associates, did not and does not own fifty-one per cent of the voting stock of Iowa-Wisconsin Bridge Company, and that testimony is directed to all of the times involved in this litigation.

We propose to show all of the facts in that connection, and to show that Mr. Thompson, Phoenix Finance Corporation, Phoenix Finance System, Thompson & Company, and no associate or affiliated company or individuals at any time controlled either Iowa-Wisconsin Bridge Company or any of the individual members of its Board of Directors.

I also propose through Mr. Thompson to identify the special report of the examination of the business and affairs of the Bridge Company made by Ernst & Ernst, certified public accountants, and certified to under date of January 17, 1940. That instrument itself will be physical- [fol. 375] ly offered in evidence through another witness.

We further offer the testimony of John A. Thompson to prove the facts in connection with the cases referred to in paragraph 7-B of the ancillary and supplemental bill of complaint, that is the suit in the court of chancery of the State of Delaware which is the subject of Exhibit "SC-2" and Exhibit "SC-102".

There is a very distinct issue of fact framed by the pleadings in this case on one point in connection with that suit. It is alleged in the bill that these shares were "surrendered and cancelled at the time said Phoenix Finance Corporation fraudulently procured the issuance of $60,500 of bonds involved in and as found in this action." The quote begins with "surrendered" and ends with "action." This allegation of fact is denied in the answer, so there is an issue in that respect, and we propose to prove through John A. Thompson that these shares have not been surrendered and cancelled, that they are still on the books of the Bridge Company as treasury stock, and that the actual certificate for the 517 shares in the name of Iowa-Wisconsin Bridge Company is in the possession of Your Honor's receiver.

We had expected through Mr. Thompson to show to Your Honor the facts and circumstances with respect to the toll ticket case, but that is now not involved in this case.

Through John A. Thompson we propose to identify and [fol. 376] offer in evidence a transcript of Mr. Thompson's statements at a stockholders' meeting of Iowa-Wisconsin Bridge Company held on July 8, 1939, and taken by Vernon L. Grant, a shorthand reporter. That particular document I will ask the reporter to mark as Exhibit "SC-110".

(Exhibit "SC-110", Transcript of proceedings of Annual Meeting of Class B. stockholders of Iowa-Wisconsin Bridge Company, July 8, 1939, marked for the respondent.)

Mr. Morford: After being identified and proven by Mr. Thompson, we also propose to offer in evidence a transcript of Mr. Thompson's statements at a stockholders' meeting of Iowa-Wisconsin Bridge Company, held on December 6, 1938, and taken by Mr. Grant, shorthand reporter, a document which I will now ask the reporter to mark as Exhibit "SC-111".

(Exhibit "SC-111", Transcript of proceedings of stockholders' meeting of Iowa-Wisconsin Bridge Company, December 6, 1938, marked for the respondent.)

Mr. Morford: We also offer Mr. Thompson's testimony in the following details:

Mr. Thompson will deny that he had an office with Shaffer and his concerns in the Phoenix Building in Minneapolis, Minnesota, as referred to in Your Honor's opinion, record page 168.

Mr. Thompson will testify that the Phoenix Building [fol. 377] in Minneapolis has no connection with Phoenix Finance Corporation or System, and that the name is a mere coincidence.

Mr. Thompson will also testify that he was not "sole owner of Thompson & Company" as your Honor stated in your opinion, record page 168.

Mr. Thompson will deny that any negotiations between Shaffer and Thompson resulted in an agreement that Thompson should have complete control of the Bridge Company, as Your Honor said in the opinion, record page 168, and Mr. Thompson will deny that there ever existed any such agreement.

Mr. Thompson will deny that at the stockholders' meeting of the Bridge Company of December 22, 1931, the "Thompson forces controlled 2273 shares, mostly by proxy," as Your Honor held in the opinion, record page 175.

Mr. Thompson will deny that Oscar R. Thorson was "an employee of the Thompson concerns," as Your Honor held in the opinion, record page 175. In that respect Mr. Thompson will show that he first met Mr. Thorson about November of 1930, and that Thorson was at no time ever connected with any of these corporations that are involved in this case.

Mr. Thompson will also testify with respect to the facts concerning the succession in interest of Phoenix Finance Corporation to Phoenix Finance System pursuant to a contract of January 11, 1932, effective January 1, 1932, [fol. 378] and will refer to the minutes of the two corpo-

rations in connection with that point. Mr. Thompson will deny in such testimony the facts as stated by Your Honor in your opinion, record page 176, that Phoenix Finance System was liquidated. He will deny that Phoenix Finance Corporation was officered by the same officers as Phoenix Finance System. He will deny that the old corporation transferred all of its assets to the new corporation, or that it was created by and officered by the same individuals. Mr. Thompson will also deny that he, Phoenix Finance System, Thompson & Company, or any affiliated corporation had at any time any connection with Standard Shares Holding Company. He will further deny that the books of the Bridge Company were kept under the supervision of Phoenix Finance Corporation, or any predecessor or affiliated company. He will further deny that the books of the Bridge Company at the termination of his presidency were in any respect false.

We also offer the testimony of John A. Thompson for the purpose of proving that there was no agreement between John W. Shaffer & Company and Phoenix Finance System, or any one of the so-called Phoenix group, wherein Phoenix Finance Corporation assumed and agreed to pay McClintic-Marshall and Industrial Contracting Company items of $21,262.71 in consideration for 100 shares of bridge stock delivered by Shaffer to Thompson. In other [fol. 379] words Mr. Thompson will demonstrate we believe very clearly that no such thing ever occurred.

Mr. Thompson is also offered as a witness to prove as a fact that Phoenix Finance System paid $10,000 to the Bridge Company under date of September 24, 1931, and turned over to the Bridge Company Liberty Bonds at the cost to Phoenix Finance System of $11,262.71 under date of December 24, 1931, for the purpose of paying—

The first date when I said $10,000?

The Reporter: December 24, 1931.

Mr. Morford: That should be September 24, 1931.

(Correction was accordingly made in the record)

Mr. Morford: We offer Mr. Thompson's testimony to show that under the contract between the Bridge Com-

pany and Shaffer & Company the Bridge Company was obligated to pay Shaffer & Company for all extras, plus fifteen per cent; that these two sums of money, or most of those two sums of money, was due to Shaffer & Company for extras which totaled $38,500; that all of the $11,262.71 was used for that purpose; over $9000 of the $10,000 item was used for that purpose, the balance being for the purpose of paying the general expenses of the Bridge Company. In that last connection I don't want to take too much time as to the details, but I did want to show Your Honor our general purpose, and I note that Mr. Thompson's testimony would be that all of the $10,000 item was used by [fol. 380] the Bridge Company for paying an extra, and that $9000 out of the $11,262.71 item was used for the purpose of paying an extra, the difference being used for the general purposes of the Bridge Company. And Mr. Thompson's testimony as so offered would also be to the effect that these sums of money were advanced after the bond issue had been authorized and upon the strength of the authorization of the bonds by the Bridge Company that Phoenix was induced to advance the last mentioned sum of money.

Although I have gone into some detail, Your Honor, I think I have covered all of the points upon which we desire to offer evidence through the medium of Mr. Thompson, who is available as a witness in this case, and whom we desire to have sworn and to so testify.

The Court: That is your formal offer?

Mr. Morford: That is our formal offer of evidence, sir.

Mr. Ontjes: The offer, Your Honor, it occurs to me that his reciting here what he proposed to prove by Mr. Thompson would be merely—

The Court: We will not take argument on it. Interpose your objection.

Mr. Ontjes: I object to it as being incompetent, irrelevant and immaterial, that the witness that is proposed to be offered is not competent, contravening the record in [fol. 381] this cause.

The Court: The objection will be sustained, and the offer of proof on the part of the respondent Phoenix Finance Corporation denied.

Mr. Morford: In that connection we also offer in evidence letter marked Exhibit "SC-106", the same being a letter from Rex Fowler to Mr. J. W. Kindig, dated July 25, 1935.

Mr. Ontjes: That is objected to as being incompetent, irrelevant and immaterial, not part of the record in this case, and cannot be added now as part of the record.

The Court: Objection sustained.

Mr. Morford: We offer in evidence the minutes of the Board of Directors meeting of Iowa-Wisconsin Bridge Company under the following dates;

March 11, 1931; November 10, 1931: December 22, 1931; March 7, 1932;

And minutes of Stockholders meetings of Iowa-Wisconsin Bridge Company of the following dates:

March 10, 1931; December 22, 1932.

Mr. Ontjes: We object to those as immaterial as new offers to be made at this time, and I might say that those minutes are already in the record before the Court.

The Court: Objection will be sustained as an offer of evidence on the part of the respondent in this proceeding.

[fol. 382] Mr. Morford: We offer in evidence letter from Iowa-Wisconsin Bridge Company to Phoenix Finance System, Inc., dated March 15, 1932, a copy of which is marked Exhibit "SC-107", and I hand for the purpose of making the offer both the copy and the original to Mr. Ontjes.

Mr. Ontjes: That is objected to as being incompetent, irrelevant and immaterial, it is an attempted offer of a letter, it is evidence at this time new, that is no part of the record in the former trial of this case.

The Court: It will be sustained.

Mr. Morford: We offer in evidence letter of Phoenix Finance System, Inc., to Iowa-Wisconsin Bridge Company,

dated March 15, 1932, copy of which is marked Exhibit "SC-108".

Mr. Ontjes: That is objected to as incompetent, irrelevant and immaterial, no bearing on the issues here now tendered, was not any part of the record in this cause.

The Court: It will be sustained.

Mr. Morford: We offer in evidence letter of Iowa-Wisconsin Bridge Company to Standard Shares Holding Company, dated March 11, 1931, with the acceptance of Standard Shares Holding Company indicated at the bottom thereof, and the resolution of the Board of Directors of Standard Shares Holding Company attached thereto, the exhibit being marked "SC-109".

Mr. Ontjes: We object to it as being incompetent, ir-[fol. 383] relevant and immaterial, no part of the record in this cause, and cannot stand as new independent evidence outside of the record.

The Court: It will be sustained.

Mr. Morford: May it be understood that as I am now offering these records I am offering them in connection with what Mr. Thompson's testimony would be, and it would require Mr. Thompson's testimony to identify them? That is understood, isn't it?

Mr. Morford: I offer in evidence the transcript of Vernon L. Grant of the statements made by Mr. Thompson at the Stockholders' meeting of July 8, 1939, the particular document being marked Exhibit "SC-110". I might state, Your Honor, that I offer this document without any of the pencil notations or comments that may appear thereon, but merely as to the typewritten record and we would substitute a clean copy without the pencil notations in lieu of the original if it is admitted.

Mr. Ontjes: Your document is objected to as being incompetent, irrelevant and immaterial; also it contains a lot of interlineations and markings and corrections and changes; whether they were made before or after the reporter made the transcript there is no way of telling.

Mr. Morford: Those are not offered.

Mr. Ontjes: And if you take your statement that you [fol. 384] claim Thompson made as responsive to what is alleged in the bill it would be different, and I think this is just a wholesale offer and not responsive.

The Court: Objection sustained.

Mr. Morford: I offer the transcript of Mr. Grant of the statements of John A. Thompson made at the stockholders' meeting of December 6, 1938; the document is marked Exhibit "SC-111".

Mr. Ontjes: That is objected to for the reason it is incompetent, irrelevant and immaterial. If he wants to point out any particular statement that he claims is responsive to what is alleged in the bill of complaint would be one thing, but this whole document would certainly be immaterial.

The Court: It will be sustained.

(Exhibit "SC-112", Photostat copy of check (front and back) dated 3-11-31, Phoenix Finance System, Inc., to Iowa-Wisconsin Bridge Co., $35,000;

(Exhibit "SC-113", Photostat copy of check (front and back) dated 3-11-31, Phoenix Finance System, Inc., to Iowa-Wisconsin Bridge Co., $15,000;

marked for the respondent.)

Mr. Morford: I offer in evidence documents marked by the reporter Exhibits "SC-112 and "SC-113", the same being photostat copies of the face and reverse sides of [fol. 385] two checks, "SC-112", being the check of Phoenix Finance System to Iowa-Wisconsin Bridge Company in the sum of $35,000, dated March 11, 1931; "SC-113" being the check of Phoenix Finance System, Inc., to Iowa-Wisconsin Bridge Company in the sum of $15,000, dated March 11, 1931.

In connection with my offer of these checks I will state that the originals are in the custody of the Clerk in this cause in some manner of which I am not informed, but the checks themselves have never been physically offered in evidence by any party.

Mr. Ontjes: Objected to as incompetent, irrelevant and immaterial, repetition of the record previously made.

The Court: It will be sustained.

Mr. Morford: I desire now to renew the motion I made at an earlier stage of this proceeding to strike and delete from the record in this cause the deposition of John A. Thompson taken at Des Moines, Iowa, on the ground that that deposition has never been offered in evidence in this case or read into the evidence in this case, either in whole or in part, and is therefore not a proper part of the record.

Further on the ground that John A. Thompson was present personally as a witness, testified on behalf [on] the interveners, and that his deposition could not therefore be used in the cause.

I think I have already stated to Your Honor that Your [fol. 386] Honor's order merely permitted it to be printed for a very limited purpose, and you did not permit it to be used as a part of the record generally.

Mr. Ontjes: That is exactly the same thing that Your Honor ruled on this afternoon, it is a mere repetition of what he said then, and I don't think anything would be gained by—

The Court: The request will be denied.

Re: Albert Penn.

Mr. Morford: Mr. Albert Penn, a witness on behalf of Phoenix Finance Corporation is present in court. I desire to have him sworn and to offer his evidence on behalf of Phoenix Finance Corporation in this case. Mr. Penn is the president of Phoenix Finance Corporation at the present time, and his evidence is offered to the same effect and with the same detail as shown by the schedule of the testimony of Albert Penn attached to the resistance of Phoenix Finance Corporation filed in this cause. Mr. Penn, if called as a witness on behalf of Phoenix Finance Corporation will testify to each and every fact stated in that schedule, and we hereby make tender of such testimony through Mr. Penn.

Mr. Ontjes: That is objected to as being incompetent, irrelevant and immaterial, and the witness is not competent to contravene the record.

The Court: The objection will be sustained and the offer [fol. 387] denied.

Re: Emory H. English.

Mr. Morford: Mr. Emory H. English, a witness on behalf of Phoenix Finance Corporation is offered to testify with respect to the compliance by Phoenix Finance Corporation with the order of this court made in this cause requiring Phoenix Finance Corporation to produce books and records pertaining to its business affairs with the Iowa-Wisconsin Bridge Company at its office in Des Moines, Iowa. Mr. English at the present time is not connected in any way with Phoenix Finance Corporation and his testimony as offered is confined solely to the one point I have just mentioned. I desire to have Mr. English sworn as a witness and to so testify.

Mr. Ontjes: Which is objected to as being incompetent, irrelevant and immaterial, and Mr. English is not competent to contravene the record of the previous trial of this cause; his testimony was in the record; he was examined and cross-examined, and any statements by him would not be a mere attempt to vary the record.

The Court: The objection will be sustained and the offer will be denied.

Re: Lee J. Skoner.

Mr. Morford: Mr. Lee J. Skoner, a witness on behalf of Phoenix Finance Corporation is present in court. I [fol. 388] desire to have him sworn as a witness. Mr. Skoner if called will testify exactly in accordance with the facts stated in the schedule of the testimony of Lee J. Skoner attached to the resistance of Phoenix Finance Corporation in this cause. Mr. Skoner's testimony is offered with respect to that schedule and each and every detail thereof.

Mr. Skoner in his testimony will also identify and prove a report of an examination of the affairs of Iowa-Wisconsin Bridge Company, including cash receipts and disbursements of Iowa-Wisconsin Bridge Company commencing November 1, 1930, and ending with the close of business September 25, 1933, said report being certified by Ernst & Ernst, certified public accountants, under date of January 17, 1940. Mr. Skoner is an accountant in the employ of Ernst & Ernst, and the preparation of this report was under his immediate charge. With the identification of Mr. Skoner we will offer in evidence the report of Ernst & Ernst, which I am asking the reporter to mark as Exhibit "SC-114".

(Exhibit "SC-114", Receipts and Disbursements, Iowa-Wisconsin Bridge Company, November 1, 1930 to September 25, 1933, marked for the respondent.)

Mr. Morford: I might state in addition that this exact exhibit is attached as an exhibit to the resistance of Phoenix Finance Corporation filed in this cause Perhaps I am incorrect in saying it is attached as an exhibit; it is [fol. 389] referred to as an exhibit, and is filed with the resistance of Phoenix Finance Corporation. I make tender of Mr. Skoner's testimony, and I offer in evidence Exhibit "SC-114".

Mr. Ontjes: We object to the offer of the testimony of Mr. Skoner as being incompetent, irrelevant and immaterial. Mr. Skoner is not competent to vary or contradict the record in this cause, nor to contravene it in any way. Further Mr. Skoner or the Phoenix Finance Corporation in the petition for rehearing presented an affidavit claiming to be by the same Mr. Skoner with respect to some of these matters, and passed on by the Court.

The Court: Objection sustained and the offer is denied in its entirety.

Mr. Morford: Defense rests.

The Court: Is that all?

Mr. Ontjes: That is all, Your Honor.

The Court: Testimony closed. Do you want a transcript of this matter?

Mr. Morford: Yes, Your Honor, we would like a transcript made and filed.

The Court: Now, do you want this case to stand submitted at this point?

Mr. Ontjes: Yes, I think so.

Mr. Morford: We are content that it stand submitted, sir.

[fol. 390] The Court: Very well. Cause submitted.

Mr. Ontjes: Yes.

[fol. 391] Reporter's Certificate.

I, R. C. Turner, a Certified Shorthand Reporter, residing in Sioux City, in the Northern District of Iowa, and the duly appointed, qualified and acting shorthand reporter in the above entitled cause:

Hereby Certify, That on the 11th day of March A. D. 1940, at the Federal Building in Sioux City, in the Northern District of Iowa, before Hon. Geo. C. Scott, District Judge, I took down in shorthand, correctly, all proceedings had on the trial of the above entitled cause on the issues joined on the supplemental and ancillary bill of complaint of the Iowa-Wisconsin Bridge Company, a corporation, and the answer of the respondent, Phoenix Finance Corporation, and have transcribed the same; that the above and foregoing is a true and correct translation of my shorthand notes so taken, and transcript of all proceedings [fol. 392] had on the trial of said cause at the time and place hereinabove mentioned.

Witness my hand at Sioux City, in the Northern District of Iowa, this 15th day of March A. D. 1940.

R. C. TURNER,
Certified Shorthand Reporter.

Filed in the District Court March 20, 1940.

[fol. 393] (Exhibit S. C. 1.)

Sum Case.

New Castle County,—ss.
The State of Delaware,

To the Sheriff of New Castle County,—Greeting:

Seal

We Command You, That you summon Iowa-Wisconsin Bridge Company a corporation duly organized and existing under the laws of the State of Delaware late of your County company so that it be and appear before the Judges of our Superior Court at Wilmington, on Monday, the Seventh day of November, next to answer Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware of a plea of trespass on the case, etc.

And have you then there this Writ.

Witness, the Honorable Daniel J. Layton, at Wilmington, the Nineteenth day of September, in the year of our Lord one thousand nine hundred and thirty-eight.

Issued Sept. 29, 1938.

MARTIN G. HANNIGAN,
Prothonotary.

[fol. 394] Summoned Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware by serving personally and delivering a copy of the within writ to Charles Peabbles, Assistant Secretary of Corporation Trust Company resident agent of said Iowa-Wisconsin Bridge Company, a corporation as aforesaid September 30, 1938.

So Ans.

JOHN M. ULMER,
Sheriff.

costs	$ .75
mlg	.10
	$ .85

No. 39 Nov. Term, A. D. 1938.

Phoenix Finance Corporation a corporation duly organized and existing under the laws of the State of Delaware,

vs.

Iowa-Wisconsin Bridge Company a corporation duly organized and existing under the laws of the State of Delaware.

Sum Case

MM&L, Esqs.

Pro.q

[fol. 395] In the Superior Court of the State of Delaware In and For New Castle County.

Summons Case.

November Term, A. D. 1938.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 39. vs.

Iowa-Wisconsin Bridge Company, a corporation duly organised and existing under the laws of the State of Delaware.

New Castle County:—ss.:

Iowa-Wisconsin Bridge Company, a corporation of the State of Delaware, the defendant in this suit, was summoned to answer Phoenix Finance Corporation, a corporation of the state of Delaware, the plaintiff in this suit, of a plea of trespass on the case upon promises, and thereupon the said plaintiff, by Marvel, Morford & Logan, its attorneys, complains:

For That Whereas, the said defendant, heretofore, to-wit, on the 15th day of December, A. D. 1932, at Des Moines, in the County of Polk, State of Iowa, to-wit, at New Castle County aforesaid, made its certain promissory note in writing, bearing date the day and year aforesaid, and thereby then and there promised to pay on the 15th day of June, A. D. 1933, to the said plaintiff, or order, the sum of Two Thousand Dollars ($2,000.00) for value received, and then

and there delivered the said promissory note to the said plaintiff; by means whereof and by force of the statute in such cases made and provided, it, the said defendant, then and there became liable to pay to the said plaintiff the said sum of money in the said promissory note specified, according to the tenor and effect of the said promissory note; and being so liable, it, the said defendant, in consideration thereof, afterwards, to-wit on the day and year aforesaid, at New Castle County aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sum of money in the said promissory note specified, according to the tenor and effect thereof.

[fol. 396] And Whereas, Also, the said defendant, heretofore, to-wit, on the 15th day of December, A. D., 1932, at Des Moines, in the County of Polk, State of Iowa, that is to say at New Castle County aforesaid, made its certain promissory note in writing, bearing date the day and year aforesaid, and thereby then and there promised to pay at 316 12th Street, Ses Moines, Iowa, on the 15th day of June, A. D. 1933, to the said plaintiff, or order, the sum of Two Thousand Dollars ($2,000.00) for value received, and then and there delivered the said promissory note to the said plaintiff; by means whereof and by force of the statute in such cases made and provided, it, the said defendant, then and there became liable to pay to the said plaintiff the said sum of money in the said promissory note specified, according to the tenor and effect of the said promissory note; and being so liable, it, the said defendant, in consideration thereof, afterwards, to-wit, on the day and year aforesaid, at New Castle County aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sum of money in the said promissory note specified, according to the tenor and effect thereof.

And Whereas Also, the said defendant, heretofore, to-wit, on the 20th day of January, A. D. 1933, at Des Moines, in the County of Polk, State of Iowa, to-wit at New Castle County aforesaid, made its certain promissory note in writing, bearing date the day and year aforesaid, and thereby then and there promised to pay, on the 20th day of July, A. D. 1933, to the said plaintiff, or order, the sum of Three Thousand One Hundred and Twenty-five Dollars ($3,125.-00) for value received, and then and there delivered the

said promissory note to the said plaintiff; by means whereof and by force of the statute in such cases made and provided, it, the said defendant, then and there became liable to pay to the said plaintiff the said sum of money in the said promissory note specified, according to the tenor and effect of the said promissory note; and being so liable, it, the said defendant, in consideration thereof, afterwards, to-wit, on the day and year aforesaid, at New Castle Coun-
[fol. 397] ty aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sum of moeny in the said promissory note specified. according to the tenor and effect thereof.

And Whereas Also, the said defendant, afterwards, to-wit, on the 15th day of June, A. D. 1938, at Des Moines, in the County of Polk, State of Iowa, that is to say at New Castle County aforesaid, was indebted to the said plaintiff in the sum of Five Thousand One Hundred and Twenty-five Dollars ($5,125.00), for so much money by the said plaintiff before that time lent and advanced to the said defendant at its like instance and request.

And Whereas Also, the said defendant afterwards, to-wit, on the 20th day of January, A. D. 1933, at Des Moines, in the County of Polk, State of Iowa, that is to say, at New Castle County aforesaid, was indebted to the said plaintiff in the further sum of Two Thousand Five Hundred Dollars ($2,500.00) for so much money before that time and then due and payable from the defendant to the said plaintiff for interest upon and for the forbearance of divers large sums of money before then lent and advanced by the said plaintiff to the said defendant at its special instance and request, and by it the said plaintiff forborne to the said defendant for divers long spaces of time, before then elapsed, at the like special instance and request of the said defendant, and also for other money, before that time and then due and payable from the said defendant to the said plaintiff for interest upon and for the forbearance of divers other large sums of money before then due and owing from the said defendant to the said plaintiff, and by it, the said plaintiff, forborne to the said defendant for divers large spaces of time before then elapsed, at the like special instance and request of the said defendant.

And, being so indebted, it, the said defendant, in consideration thereof, afterwards, to-wit, on the day and year aforesaid, at Des Moines, in the County of Polk, State of Iowa, that is to say at New Castle County aforesaid, undertook and then and there faithfully promised the said plain- [fol. 398] tiff to pay it the said aforementioned sums of money when it, the said defendant, should be thereunto afterwards requested.

Nevertheless, the said defendant, not regarding its said several promises and undertakings in this behalf, did not pay to the said plaintiff the several sums of money above mentioned or any of them or any part thereof, although often requested so to do; but the said defendant hath hereunto neglected and refused and still doth neglect and reguse to pay the same to the said plaintiff, to the damage of the said plaintiff of the sum of Ten Thousand Dollars ($10,000.00), and therefore it brings its suit, &c.

MARVEL, MORFORD & LOGAN,
Attorneys for Plaintiff.

Copy of Instruments Sued Upon.

$3,125.00 Des Moines, Iowa, Jan. 20, 1933.

On the 20 day of July, 1933, for value received, We promise to pay to the order of Phoenix Finance Corporation the sum of Thirty-one hundred twenty-five and no/100 Dollars Payable at 316 12th Street, Des Moines, Iowa. with interest at 8 per cent per annum from date. Interest payable semi-annually.

Upon default of payment of this note, the makers, endorsers, guarantors, and sureties, agree to pay all attorneys' fees and expenses of collection, and consent that any justice of the peace may have jurisdiction on this note to the amount of $300.00, and . . . do hereby severally waive demand of payment, protest, and notice of protest of this note and consent that time of payment may be extended

without notice. A failure to pay interest when due, shall cause this note to become due.

IOWA-WISCONSIN BRIDGE COMPANY,
By Oscar R. Thorson,
Secretary-Treasurer.

P. O. Address .....

No. .....

[fol. 399] $2,000.00 Des Moines, Iowa, December 15, 1932.

On the 15 day of June, 1933, for value received, We promise to pay to the order of Phoenix Finance Corporation the sum of Two Thousand and No/100 Dollars, Payable at 316 12th street, Des Moines, Iowa, with interest at 8 per cent. per annum from date. Interest payable semi-annually. Upon default of payment of this note, the makers, endorsers, guarantors, and sureties, agree to pay all attorneys' fees and expenses of collection, and consent that any justice of the peace may have jurisdiction of this note to the amount of $300.00, and we do hereby severally waive demand of payment, protest, and notice of protest of this note, and consent that time of payment may be extended without notice. A failure to pay interest when due, shall cause this note to become due.

IOWA-WISCONSIN BRIDGE COMPANY,
By Oscar R. Thorson,
Secretary-Treasurer.

P. O. Address .....

No. .....

[fol. 400] Bill of Particulars.

For money lent and advanced to Iowa-Wisconsin Bridge Company by Phoenix Finance Corporation, to-wit, on or about the 15th day of December, A. D. 1932 ..... $2,000.00

For interest due and owning upon the above sum of money by Iowa-Wisconsin Bridge Company to Phoenix Finance Corporation from the 15th day of December, A. D. 1932, to date 1,000.00

For money lent and advanced to Iowa-Wisconsin Bridge Company by Phoenix Finance Corporation, to-wit, on or about the 20th day of January, A. D. 1933 ..... 3,125.00

For interest due and owing upon the above sum of money by Iowa-Wisconsin Bridge Company to Phoenix Finance Corporation from the 20th day of January, A. D. 1933, to date 1,500.00

[fol. 401] State of Delaware,
New Castle County.—ss.:

I, Martin G. Hannigan, Prothonotary of the Superior Court of the State of Delaware, in and for New Castle County, do hereby certify that the foregoing pages contain a true copy of the writ, Sheriff's return & Narr in the case there stated as the same now remains in the Superior Court of the said State, at Wilmington.

In testimony whereof, I hereunto set my hand and affix the seal of the said Court, this Fifth day of February, A. D., One thousand nine hundred and forty.

(Seal) MARTIN G. HANNIGAN,
Prothonotary.

State of Delaware, to-wit:—

I, Daniel J. Layton, Chief Justice of the State of Delaware, and as such, the Presiding Judge of the Superior Court of the said State, do hereby certify that the foregoing Record and attestation, made by Martin G. Hannigan, Esq., Prothonotary of the said Court, within the County of New Castle, whose name is thereto subscribed, and to which the seal of said Court is affixed, are in due form, and made by the proper officer.

In testimony whereof, I hereunto set my hand, this Fifth day of February, A. D., One thousand nine hundred and forty.

DANIEL J. LAYTON,
Chief Justice.

[fol. 402] State of Delaware,
New Castle County,—ss.:

I, Martin G. Hannigan, Prothonotary of the Superior Court of the State of Delaware, in and for the County of New Castle, do certify that the Honorable Daniel J. Layton, Esquire, by whom the foregoing attestation was made, and whose name is thereto subscribed, was at the time of making thereof, and still is, Chief Justice of the State of Delaware, and, as such, the Presiding Judge of the Superior Court of the said State, duly commissioned and sworn, to all whose acts, as such, full faith and credit are, and ought to be, given, as well in Courts of Justice as elsewhere.

In testimony whereof, I hereunto set my hand and affix the seal of the said Court, this Fifth day of February, A. D., One thousand nine hundred and forty.

MARTIN G. HANNIGAN,
(Seal) Prothonotary.

Filed in the District Court March 20, 1940.

[fol. 403] (Exhibit SC-2.)

In the Court of Chancery of the State of Delaware in and for New Castle County.

Bill of Complaint.

Phoenix Finance Corporation, a corporation of the State of Delaware, Complainant,

vs.

Iowa-Wisconsin Bridge Company, a corporation of the State of Delaware, Respondent.

To the Chancellor of the State of Delaware

Humbly complaining, showeth unto your Honor, your Orator, Phoenix Finance Corporation, as follows:

1. That your Orator, Phoenix Finance Corporation, is a corporation duly organized and existing under the laws

of the State of Delaware, having been incorporated on the 29th day of December, 1931, and having its principal place of business within the State of Delaware at 900 Market Street, City of Wilmington, State of Delaware.

2. That the respondent, Iowa-Wisconsin Bridge Company is a corporation duly organized and existing under the laws of the State of Delaware, having been organized at Lansing Bridge Company on the 20th day of March, A. D. 1928, and thereafter, on the 11th day of June, A. D. 1928, having changed its name to Iowa-Wisconsin Bridge Company by an amendment to its certificate of incorporation. Said corporation has its principal place of business within the State of Delaware at 100 West Tenth Street, Wilmington, Delaware.

3. That said respondent has an authorized capital stock consisting of 3,750 Class B shares without par value. Said Class A shares are without voting rights, except as expressly conferred by statute, while said Class B shares have the sole right to elect directors for said corporation. At the present time 3632 shares of the Class A stock and 3637 shares of the Class B stock are issued and outstanding and are held by numerous stockholders. The respondent holds as treasury stock 38 shares of the Class A and 90 shares of the Class B stock.

[fol. 404] 4. That on or about the 1st day of November A. D. 1931 the respondent issued a certificate for 517 shares of its Class A stock, which certificate was numbered N1220, dated November 1, 1931, and was issued in the name of Phoenix Finance System, Inc. Said 517 shares, when issued as aforesaid to Phoenix Finance System, Inc., were fully paid for and non-assessable, and said Phoenix Finance System, Inc., became the holder of record of said number of shares represented by said certificate. Phoenix Finance System, Inc., as of January 1, 1932, sold, transferred and assigned for a valuable consideration said 517 shares and the certificate representing the same unto your Orator, Phoenix Finance Corporation, and as of March 15, 1932, your Orator, Phoenix Finance Corporation, was the owner of 517 shares of the Class A stock of the respondent and held certificate #N1220 above mentioned which had been transferred and endorsed to it as evidence of its ownership of said stock.

5. That on the 15th day of March, A. D. 1932, your Orator transferred and assigned said 517 shares and said certificate N1220 to the respondent, Iowa-Wisconsin Bridge Company, in exchange for the issuance and delivery unto it by said respondent of $60,390.14 in principal amount of respondent's First Mortgage Gold Bonds, 6%, dated February 1, 1932, issued under a Deed of Trust dated January 1, 1932, between Iowa-Wisconsin Bridge Company and Bechtel Trust Company, as Trustee. Said bonds were issued in the form of bearer bonds. At said time your Orator also gave Iowa-Wisconsin Bridge Company a credit of $109.86 so that a total of $60,500 in principal amount of said bonds could be issued unto it.

6. The form of said exchange was that of a purchase from your Orator by said Iowa-Wisconsin Bridge Company of said 517 shares of its Class A stock and the consideration for said purchase was the issuance and delivery unto your Orator of the bonds of Iowa-Wisconsin Bridge Company as aforesaid.

[fol. 405] 7. That on the 15th day of March, A. D. 1932, when said purported purchase and sale took place as aforesaid, whereby your Orator sought to sell and the respondent sought to purchase 517 shares of the Class B stock of the respondent from your Orator in consideration of the issuance of said bonds of the respondent, there was an impairment of the capital of said respondent and by virtue of said attempted purchase and sale the capital of the respondent was further impaired.

8. Your Orator has been advised and informed and believes and therefore avers that under and pursuant to the provisions of Section 19 of the Delaware Corporation Law the sale by it as aforesaid of said 517 shares of the Class A stock of respondent to the respondent in consideration of the issuance and delivery by the respondent to your Orator of said bonds as aforesaid, was invalid and void. Your Orator further says that said respondent, Iowa-Wisconsin Bridge Company, has refused to recognize said purchase and sale as having been a valid transaction and has refused to recognize that said bonds held by your Orator are valid and enforceable obligations of said respondent.

9. The respondent made two semi-annual payments of interest upon said bonds, namely, on August 1, 1932, and on February 1, 1933, but has made no further or other payments of interest to your Orator and has refused to pay to your Orator the principal amount with interest now due and payable upon said bonds. The sums received by your Orator for said two semi-annual interest payments came from funds which your Orator advanced unto the respondent and which have not been repaid unto your Orator.

10. Your Orator says that by virtue of said attempted purchase and sale having been invalid and void, it has at all times continued as a stockholder owning said 517 shares of the Class A stock of the respondent. After your Orator transferred and delivered said certificate #N1220 to the respondent the respondent caused the same to be cancelled and issued in place thereof certificate N1239 dated March [fol. 406] 15, 1932, for said 517 shares of the Class A stock and issued the same in the name of the respondent, and thereafter retained the same and still holds the same as treasury stock.

11. Your Orator has made a demand upon the respondent for the delivery unto your Orator of a certificate for said 517 shares, but the respondent has refused to deliver a certificate for said number of shares unto your Orator or to register your Orator on its books as the owner of said 517 shares.

12. Your Orator hereby offers to bring into Court and surrender for delivery to the respondent $60,390.14 in principal amount of respondent's First Mortgage Gold Bonds, 6%, dated February 1, 1932, issued by Iowa-Wisconsin Bridge Company as aforesaid, upon said respondent registering it as the holder of said 517 shares upon the books of respondent and issuing unto it a certificate for said 517 shares.

Wherefore, your Orator prays as follows:

(1) That a subpoena may issue directed to said respondent requiring it to appear and answer this bill of complaint.

(2) That a decree be entered herein directing the respondent to register your Orator, Phoenix Finance Corpo-

ration, upon its books and records as the owner of the 517 shares of the Class A stock of the respondent above mentioned and to issue and deliver unto your Orator a certificate for said shares.

(3) That your Orator may have such further and other relief as the nature of the case may require and to your Honor may seem equitable and proper.

PHOENIX FINANCE
CORPORATION,
By Dee E. Renshaw,
Vice-President.

Attest:
DEE E. RENSHAW,
Vice-Pres.

Arthur G. Logan,
Marvel, Morford & Logan,
Solicotors for Complainant.

[fo'. 407] State of Florida,
County of St. Lucie—ss.:

Be It Remembered that on this 30th day of September A. D. 1938, personally appeared before me, the subscriber, a Notary Public for the State and County aforesaid, Dee E. Renshaw, who being by me first duly sworn according to law, did depose and say:

That he is Vice-President of Phoenix Finance Corporation, the complainant named in the foregoing bill of complaint; that he has read the foregoing bill of complaint and knows the contents thereof; that what is set forth in said bill of complaint, so far as the same relates to his own act and deed, or to the act and deed of said complainant, is true, and so far as the same relates to the act and deed of any other person or persons he believes the same to be true; that he has executed the foregoing bill of complaint on behalf of the corporation pursuant to authority of the Board of Directors.

DEE. E. RENSHAW.

Sworn to and subscribed before me the day and year aforesaid.

E. S. WILLES,
Notary Public.
(Notary Public, State of Florida at Laige.
My commission expires Jn. 15, 1939)

Filed Feb. 18, 1939.

[fol. 408] State of Delaware,
New Castle County—ss.

I, Anthony F. Emory, Register of the Court of Chancery of the State of Delaware, in and for New Castle County, do hereby certify that the foregoing is a true and correct copy of the Bill of Complaint, filed February 18, A. D. 1939, in the cause of Phoenix Finance Corporation vs. Iowa-Wisconsin Bridge Company, as the same remains on file and of record in said Court.

In Testimony Whereof, I have hereunto, set my hand and affixed the seal of said Court, at Wilmington, this Fifth day of February in the year of our Lord, nineteen hundred and forty.

ANTHONY F. EMORY,
(Seal) Register in Chancery.

State of Delaware, to-wit:

I, William Watson Harrington, Chancellor of the State of Delaware, do hereby certify that the foregoing Record and Attestation, made by Anthony F. Emory, Esquire, Register in Chancery within the County of New Castle, whose name is thereto subscribed, and to which the seal of said Court is affixed, are in due form of law, and made by the proper officer.

In Testimony Whereof, I have hereunto set my hand, this Fifth day of February in the year of our Lord, nineteen hundred and Forty.

WM. WATSON HARRINGTON,
Chancellor.

[fol. 409] State of Delaware,
New Castle County—ss.

I, Anthony F. Emory, Register of the Court of Chancery of the State of Delaware, in and for New Castle County, do hereby certify that the Honorable William Watson Harrington, by whom the foregoing attestation was made and whose name is thereto subscribed, was at the time of the making thereof, and still is Chancellor of the State of Delaware, duly commissioned and sworn, to all whose acts, as such full faith and credit are and ought to be given, as well in Courts of Justice as elsewhere.

In Testimony Whereof, I have hereunto, set my hand and affixed the seal of the Court, at Wilmington, this Fifth day of February in the year of our Lord Nineteen hundred and forty.

ANTHONY F. EMORY,
(Seal) Register in Chancery.

Filed in the District Court March 20, 1940.

[fol. 410] (Exhibit S. C. 3)

Sum Case

New Castle County—ss.:

The State of Delaware,

To the Sheriff of New Castle County,—Greeting:

Seal

We Command You, That you summon Iowa-Wisconsin Bridge Company a corporation duly organized and existing under the laws of the State of Delaware late of your County company so that it be and appear before the Judges of our Superior Court at Wilmington, on Monday, the Eighteenth day of September next to answer Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware of a plea of trespass on the case, etc.

And have you then there this Writ.

Witness, the Honorable Daniel J. Layton, at Wilmington, the First day of May in the year of our Lord one thousand nine hundred and thirty-nine.

Issued June 22, 1939.

MARTIN G. HANNIGAN,
Prothonotary.

[fol. 411] Summoned Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware, by serving a copy of the within writ upon Charles S. Peabbleo, Assistant Secretary of the Corporation Trust Company, said Corporation Trust Company being Resident Agent in the State of Delaware for the said Iowa-Wisconsin Bridge Company, a corporation as aforesaid, on the twenty-third day of June A. D. 1939. The President or other head officers of the said Iowa-Wisconsin Bridge Company, a corporation as aforesaid, not being found within the State of Delaware.

So Answers,

SAMUEL M. FORD,
Sheriff.

Cost .75
Mlg. .10

.85

Sept. Term, A. D. 1939.

Phoenix Finance Corporation a corporation duly organized and existing under the laws of the State of Delaware,

No. 65 vs.

Iowa-Wisconsin Bridge Company a corporation duly organized and existing under the laws of the State of Delaware.

(copy)

Sum Case

MM&L, Esqs.

Pro.q

[fol. 412] Exhibit 3-a

In the Superior Court of the State of Delaware in and for New Castle County

Summons Case

September Term 1939.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 65 vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

State of Florida,
County of Pinellas—ss.:

Before Me, Josie Lee Bates, a Notary Public for the State of Florida and the County aforesaid, personally comes M. K. Thompson, Treasurer of Phoenix Finance Corporation, the plaintiff above named, who being by me duly sworn according to law, deposes and says:

That she is Treasurer of Phoenix Finance Corporation, the said plaintiff; that annexed hereto are true and correct copies of the promissory notes sued upon in this action; that the sum demanded of the said defendant is the sum of Twelve Thousand Six Hundred Ten Dollars and Nineteen Cents ($12.,610.19) with interest at the rate of 8% per annum on the sum of Twelve Thousand One Hundred Ten Dollars and Nineteen Cents ($1.2,110.19) from the 7th day of July, 1933, and interest at the rate of 8% per annum on the sum of Five Hundred Dollars ($500.00) from the 31st day of December, 1932, said interest rates of 8% being the lawful rate of interest in the State of Iowa at the time of the making and delivery of said promissory notes, and the said deponent further says that she verily believes that the said sum of Twelve Thousand Six Hundred Ten Dollars and Nineteen Cents ($12,610.19) with interest as aforesaid is justly and truly due from the said defendant to the said plaintiff.

M. K. THOMPSON.

Corporate seal

Sworn to and subscribed before me this 30th day of June A. D. 1939.

JOSIE LEE BATES,
Notary Public.

(Seal)

[fol. 413]

$500.00 Des Moines, Iowa December 31, 1932.

On the 31 day of June 1933 for value received we promise to pay to the order of Phoenix Finance Corporation the sum of Five Hundred and No/100 dollars payable at 316 12th Street, Des-Moines, Iowa with interest at 8 per cent per annum from date. Interest payable semi-annually.

Upon default of payment of this note, the makers, endorsers, guarantors, and sureties, agree to pay all attorneys' fees and expenses of collection, and consent that any justice of the peace may have jurisdiction on this note to the amount of $300.00 and we do hereby severally waive demand of payment, protest, and notice of protest of this note and consent that time of payment may be extended without notice. A failure to pay interest when due shall cause this note to become due.

IOWA-WISCONSIN BRIDGE COMPANY,
By Oscar R. Thorson,
Secy-Treas.

P. O. Address.....

No. .....

[fol. 414]

Des Moines, Iowa
July 7, 1933.

$12,110.19

On Demand, for value received, the undersigned promises to pay to the order of the Phoenix Finance Corporation at its office in Des Moines, Iowa the sum of Twelve Thousand One Hundred Ten and 19/100 Dollars ($12,110.19) with interest payable semi annually at the rate of Eight (8%) per cent per annum from date.

Default in the payment of any installment of interest hereof, shall at the option of the holder hereof and without

notice render the then unpaid balance of the principal hereof and accrued interest thereon, at once due and payable.

Extension of the time of payment of all or any part of the amount owing hereon at any time, or times, shall not affect the liability of said party hereto.

And, we, the undersigned, hereby transfer and deliver to the legal holder of the above note, as collateral security, for the payment of said note and of any other liabilities of the undersigned to the said payee or assigns, due or to become due, or that hereafter may be contracted, the following Class B bonds of the Iowa-Wisconsin Bridge Company described as Follows:

Bond Nos.	Denomination	Maturity date	Total
106 to 111 inc.	$ 100 00	Feb. 1, 1947	$ 600.00
119	500 00	Feb. 1, 1947	500.00
121 to 130 inc.	500 00	Feb. 1, 1949	5,000.00
131	5000 00	Feb. 1, 1950	5,000.00
132 to 139 inc.	500 00	Feb. 1, 1951	4,000.00
142	5000 00	Feb. 1, 1952	5,000.00
			20,100 00

The undersigned hereby gives the said payee or assigns, authority to sell the said bonds or any part thereof or any substitutes therefor, and all additions thereto, on the maturity of the above note, or any time thereafter, at any public or private sale, the option of the said payee or assigns, without publishing notice of the same, or giving notice, with the right to said payee or assigns themselves to be the purchasers. And after deducting all costs and expenses, including legal attorney's fees, to apply the residue of proceeds of sale to the payment of any, either or all liabilities as aforesaid, as said payee or assigns shall elect, returning the overplus to the undersigned; and in case the said proceeds shall not cover the principal, interest and said expenses, the undersigned promises to pay the deficiency immediately after such sale with interest on the unpaid balance of principal at 8% per annum.

Signed by authority of the Board of Directors of the Iowa-Wisconsin Bridge Company this 7th day of July 1933.

IOWA-WISCONSIN BRIDGE COMPANY,
By Emory H. English,
Vice-President.
By Oscar R. Thorson,
(Seal) Secretary-Treasurer.

[fol. 415] Exhibit 3

In the Superior Court of the State of Delaware in and for New Castle County

September Term, 1939.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 65 vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

New Castle County—ss.:

Iowa-Wisconsin Bridge Company, a corporation of the State of Delaware, the defendant in this suit, was summoned to answer Phoenix Finance Corporation, a corporation of the State of Delaware, the plaintiff in this suit, of a plea of trespass on the case upon promises, and thereupon the said plaintiff, by Marvel, Morford & Logan, its attorneys, complains:

For That Whereas, the said defendant, heretofore, to-wit, on the 31st day of December, A. D. 1932, at Des Moines, in the County of Polk, State of Iowa, to-wit, at New Castle County aforesaid, made its certain promissory note in writing, bearing date the day and year aforesaid, and thereby then and there promised to pay on the 31st day of June A. D. 1933, to the order of the said plaintiff, for value received, the sum of Five Hundred Dollars ($500.00), payable at 316 12th Street, Des Moines, Iowa, with interest at 8% per annum from the date thereof, payable semi-

annually, and then and there delivered the said promissory note to the said plaintiff; by means whereof and by force of the statute in such cases made and provided, it, the said defendant, then and there became liable to pay to the said plaintiff the said sum of money in said promissory note specified, according to the tenor and effect of said promissory note; and being so liable, it, the said defendant, in consideration thereof, afterwards, to-wit, on the day and year aforesaid, at New Castle County, aforesaid, undertook and then and there faithfully promised the said [fol. 416] plaintiff to pay it the said sum of money in said promissory note specified, according to the tenor and effect thereof.

And Whereas Also, the said defendant, heretofore, to-wit, on the 7th day of July, A. D. 1933, at Des Moines, in the County of Polk, State of Iowa, to-wit, at New Castle County aforesaid, made its certain promissory note in writing, bearing date the day and year aforesaid, and thereby then and there promised to pay, on demand, for value received, to the order of the said plaintiff, at its office in Des Moines, Iowa, the sum of Twelve Thousand One Hundred Ten Dollars and Nineteen Cents ($12,110.19), with interest, payable semi-annually, at the rate of 8% per annum from the date thereof. and then and there delivered the said promissory note to the said plaintiff; by means whereof and by force of the statute in such cases made and provided, it, the said defendant, then and there became liable to pay to the said plaintiff the said sum of money in said promissory note specified, according to the tenor and effect of said promissory note; and being so liable, it, the said defendant, in consideration thereof, afterwards, to-wit, on the day and year aforesaid, at New Castle County aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sum of money in said promissory note specified, according to the tenor and effect thereof. And the said plaintiff in fact says that afterwards, to-wit, on or about the 1st day of October, A. D. 1933, to-wit, at the County aforesaid, payment of said sum of money in said promissory note specified was duly demanded by the plaintiff of the said defendant, according to the tenor and effect of said promissory note.

And Whereas Also, the said defendant, heretofore, to-wit, on the 7th day of July, A. D. 1933, at Des Moines, in the County of Polk, State of Iowa, to-wit, at New Castle County aforesaid, made its certain promissory note in writing, bearing date the day and year aforesaid, and thereby then and there promised to pay, on demand, for value received, to the order of the said plaintiff, at its office in Des Moines, Iowa, the sum of Twelve Thousand One Hundred Ten Dollars and Nineteen Cents ($12,110.19), with interest, payable semi-annually, at the rate of 8% per annum [fol. 417] from the date thereof, and then and there delivered the said promissory note to the said plaintiff; by means whereof and by force of the statute in such cases made and provided, it, the said defendant, then and there became liable to pay to the said plaintiff the said sum of money in said promissory note specified, according to the tenor and effect of said promissory note; and being so liable, it, the said defendant, in consideration thereof, afterwards, to-wit, on the day and year aforesaid, at New Castle County aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sum of money in said promissory note specified, according to the tenor and effect thereof.

And Whereas Also, the said defendant, afterwards, to-wit, on the 1st day of January, A. D. 1934, at Des Moines, in the County of Polk, State of Iowa, to-wit, at New Castle County aforesaid, was indebted to the said plaintiff in the sum of Fifteen Thousand Dollars ($15,000.00), for so much money by the said plaintiff before that time lent and advanced to the said defendant at its like special instance and request.

And Also in the further sum of Fifteen Thousand Dollars ($15,000.00), like lawful money, for so much money by the said plaintiff before that time paid, laid out and expended to and for the use of the said defendant at its like special instance and request.

And Also in the further sum of Fifteen Thousand Dollars ($15,000.00), like lawful money, for so much money by the said defendant before that time had and received to and for the use of the said plaintiff.

And Whereas Also, the said defendant, afterwards, to-wit, on the day and year aforesaid, at the County aforesaid, accounted with the plaintiff of and concerning divers other sums of money from the said defendant to the said plaintiff before that time due and owing and then in arrears and unpaid, and on such accounting the said defendant was then and there found to be in arrear and indebted to the said plaintiff in the further sum of Fifteen Thousand [fol. 418] Dollars ($15,000.00) of like lawful money.

And Whereas Also, the said defendant, afterwards, to-wit, on the 1st day of July, A. D. 1939, at Des Moines, in the County of Polk, State of Iowa, to-wit, at New Castle County aforesaid, was indebted to the said plaintiff in the further sum of Seven Thousand Dollars ($7,000.00), like lawful money, for so much money before that time and then due and payable from the defendant to the said plaintiff for interest upon and for the forebearance of divers large sums of money before then lent and advanced by the said plaintiff to the said defendant at its special instance and request, and byt it, the said plaintiff, forborne to the said defendant for divers long spaces of time before then elapsed, at the like special instance and request of the said defendant, and also for other money before that time and then due and payable from the said defendant to the said plaintiff for interest upon and for the forbearance of divers other large sums of money before then due and owing from the said defendant to the said plaintiff, and by it, the said plaintiff, forborne to the said defendant for divers large spaces of time before then elapsed, at the like special instance and request of the said defendant.

And Being So Indebted, it, the said defendant, in consideration thereof, afterwards, to-wit, on the several dates aforesaid, at Des Moines, in the County of Polk, State of Iowa, to-wit, at New Castle County aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said aforementioned sums of money when it, the said defendant, should be thereunto afterwards requested.

Nevertheless, the said defendant, not regarding its said several promises and undertakings in this behalf, did not pay to the said plaintiff the several sums of money above mentioned, or any of them, or any part thereof, although

often requested so to do; but the said defendant hath hitherto neglected and refused and still doth neglect and refuse to pay the same to the said plaintiff, to the damage of the said plaintiff of the sum of Twenty-five Thousand Dollars ($25,000.00), and therefore it brings its suit, &c.

MARVEL, MORFORD & LOGAN,
Attorneys for Plaintiff.

[fol. 419] Copy of Instruments Sued Upon

$**500.00** Des Moines, Iowa, December 31, 1932.

On the 31 day of June 1933, for value received we promise to pay to the order of Phoenix Finance Corporation the sum of

.....Five Hundred and No/100.....Dollars

Payable at 316 12th Street, Des Moines, Iowa.

with interest at 8 per cent. per annum from date. Interest payable semi annually.

Upon default of payment of this note, the makers, endorsers, guarantors and sureties, agree to pay all attorneys' fees and expenses of collection, and consent that any justice of the peace may have jurisdiction on this note to the amount of $300.00, and we do hereby severally waive demand of payment, protest, and notice of protest of this note and consent that time of payment may be extended without notice. A failure to pay interest when due, shall cause this note to become due.

IOWA-WISCONSIN BRIDGE
COMPANY,
By Oscar R. Thorson,
Secy-Treas.

P. O. Address
No.

[fol. 420] Des Moines, Iowa.
July 7, 1933.

$12,110.19

On demand, for value received, the undersigned promises to pay to the order of the Phoenix Finance Corporation at

its office in Des Moiner, Iowa the sum of Twelve Thousand One Hundred Ten and 19/100 Dollars ($12,110.19) with interest payable semi annually at the rate of Eight (8%) per cent per annum from date.

Default in the payment of any installment of interest hereof, shall at the option of the holder hereof and without notice render the then unpaid balance of the principal hereof and accrued interest thereon, at once due and payable.

Extension of the time of payment of all or any part of the amount owing hereon at any time, or times, shall not affect the liability of said party hereto.

And we, the undersigned, hereby transfer and deliver to the legal holder of the above note, as collateral security, for the payment of said note and of any other liabilities of the undersigned to the said payee or assigns, due or to become due, or that hereafter may be contracted, the following Class B. bonds of the Iowa-Wisconsin Bridge Company described as follows:

Bond Nos.	Denomination	Maturity Date	Total
106 to 111 inc.	$ 100.00	Feb. 1, 1947	$ 600.00
119	500.00	Feb. 1, 1947	500.00
121 to 130 inc.	500.00	Feb. 1, 1949	5,000.00
131	5000.00	Feb. 1, 1950	5,000.00
132 to 139 inc.	500.00	Feb. 1, 1951	4,000.00
142	5000.00	Feb. 1, 1952	5,000.00
			20,100.00

The undersigned hereby gives the said payee or assigns, authority to sell the said bonds or any part thereof or any substitutes therefor, and all additions thereto, on the maturity of the above note, or at any time thereafter, at any public or private sale, at the option of the said payee or assigns, without publishing notice of the same, or giving notice, with the right to said payee or assigns themselves to be the purchasers. And after deducting all costs and expenses, including legal attorney's fees, to apply the residue of proceeds of sale to the payment of any, either or all liabilities as aforesaid, as said payee or assigns shall elect, returning the overplus to the undersigned; and in case the said proceeds shall not cover the principal, inter-

MICRO CARD
TRADE MARK ®
22
41
MATTHEW BENDER & COMPANY
630
659
microcard

est and said expenses, the undersigned promises to pay the deficiency immediately after such sale with interest on the unpaid balance of principal at 8% per annum.

Signed by authority of the Board of Directors of the Iowa-Wisconsin Bridge Company this 7th day of July, 1933.

IOWA-WISCONSIN BRIDGE COMPANY,
By Emory H. English,
Vice-President.
By Oscar R. Thorson,
(Corporate Seal.) Secretary-Treasurer.

[fol. 421] Bill of Particulars.

For money lent and advanced to Iowa-Wisconsin Bridge Company by Phoenix Finance Corporation, to wit, on or about the 31st day of December, A. D. 1932 ..... $	500.00
For interest due and owing upon the above sum of money by Iowa-Wisconsin Bridge Company to Phoenix Finance Corporation from the 31st day of December, A. D. 1932 to date	300.00
For money lent and advanced to Iowa-Wisconsin Bridge Company by Phoenix Finance Corporation, to wit, on or about the 7th day of July A. D. 1933, ...	12,110.19
For interest due and owning upon the above sum of money by Iowa-Wisconsin Bridge Company to Phoenix Finance Corporation from the 7th day of July, A. D. 1933, to date....	6,700.00

[fol. 422] State of Delaware,
New Castle County—ss.

I, Martin G. Hannigan, Prothonotary of the Superior Court of the State of Delaware, in and for new Castle County, do hereby certify that the foregoing pages contain a true copy of the Affidavit of Demand & Writ, together with the Narr filed in the case there stated as the same now remains in the Superior Court of the said State, at Wilmington.

In testimony whereof, I hereunto set my hand and affix the seal of the said Court, this Sixteenth day of February A. D. One thousand nine hundred and forty.

MARTIN G. HANNIGAN,
Prothonotary.

(Seal)

State of Delaware, to-wit:—

I, Daniel J. Layton, Chief Justice of the State of Delaware, and as such, the Presiding Judge of the Superior Court of the said State, do hereby certify that the foregoing Record and attestation, made by Martin G. Hannigan Esq., Prothonotary of the said Court, within the County of New Castle, whose name is thereto subscribed, and to which the seal of said Court is affixed, are in due form, and made by the proper officer.

In testimony whereof, I hereunto set my hand, this Sixteenth day of February A. D. One thousand nine hundred and forty.

DANIEL J. LAYTON,
Chief Justice.

[fol. 423] State of Delaware,
New Castle County,—ss.:

I, Martin G. Hannigan, Prothonotary of the Superior Court of the State of Delaware, in and for the County of New Castle, do certify that the Honorable Daniel J. Layton, Esquire, by whom the foregoing attestation was made, and whose name is thereto subscribed, was at the time of making thereof, and still is, Chief Justice of the State of Delaware, and, as such, the Presiding Judge of the Superior Court of the said State, duly commissioned and sworn, to all whose acts, as such, full faith and credit are, and ought to be, given, as well in Courts of Justice as elsewhere.

In testimony whereof, I hereunto set my hand and affix the seal of the said Court, this Sixteenth day of February, A. D., One thousand nine hundred and forty.

(Seal)

MARTIN G. HANNIGAN,
Prothonotary.

Filed in the District Court March 20, 1940.

[fol. 424] (Exhibit S. C. 4.)

Sum Case.

New Castle County,—ss.:
The State of Delaware,

To the Sheriff of New Castle County,—Greeting:

Seal

We Command You, That you summon Iowa-Wisconsin Bridge Company a corporation duly organized and existing under the laws of the State of Delaware late of your County company so that it be and appear before the Judges of our Superior Court at Wilmington, on Monday, the Eighteenth day of September next to answer Phoenix Finance Corporation a corporation duly organized and existing under the laws of the State of Delaware of a plea that it hold and keep with it the covenant between them made according to the force and effect of certain articles of agreement between them and &c.

And have you then there this Writ.

Witness, the Honorable Daniel J. Layton, at Wilmington, the First day of May in the year of our Lord one thousand nine hundred and thirty-nine.

Issued Jun. 22, 1939.

MARTIN G. HANNIGAN,
Prothonotary.

[fol. 425] Summoned Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware, by serving a copy of the within writ upon Charles S. Peabbleo, Assistant Secretary of Corporation Trust Company, said Corporation Trust Company being Resident Agent in the State of Delaware for the said Iowa-Wisconsin Bridge Company, a corporation as aforesaid, on the twenty-third day of June, A. D., 1939. The President or other head officers of the said Iowa-Wisconsin

Bridge Company, a corporation as aforesaid, not being found within the State of Delaware.

So Ans.

Cost .75
Mlg. .10

.85

SAMUEL M. FORD,
Sheriff.

Sept. Term, A. D. 1939.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 64. vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

(copy)

Sum Covenant

MM&L, Esqs.

Pro.q

[fol. 426] Exhibit 4.

September Term, 1939.

In the Superior Court of the State of Delaware,
In and For New Castle County.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 64. vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

New Castle County.—ss.:

Iowa-Wisconsin Bridge Company, a corporation of the State of Delaware, the defendant in this suit, was summoned to answer Phoenix Finance Corporation, a corpora-

tion of the State of Delaware, the plaintiff in this suit, of a plea of breach of covenant, and thereupon the said plaintiff, by Marvel, Morford & Logan, its attorneys, complains:

For That Whereas, heretofore, to-wit, on the 10th day of November, A. D. 1930, at Nennepin County, State of Minnesota, to-wit, at New Castle County aforesaid, by a written indenture or agreement in triplicate then and there made between Phoenix Finance System, Inc., a corporation of the State of Delaware, of the one part, John W. Shaffer & Company, a body corporate, of the second part, and the defendant of the third part, one part of which said indenture or agreement in triplicate, sealed with the seals of the parties thereto, including the defendant, the said plaintiff now brings into Court, the date whereof is the day and year aforesaid, the said parties thereto covenanted and agteed each with the other in words and figures as follows, to-wit:

"This agreement made and entered into in triplicate by and between Phoenix Finance System, Inc., first party, and John W. Shaffer & Company, second party, and Iowa-Wisconsin Bridge Company, third party, witnesseth:

[fol. 427] Whereas, First party has large financial means, Second party has contracted to build the Black Hawk Bridge at Lansing, Iowa and the Third party is owner of the Black Hawk Bridge, and

Whereas endorsements are necessary and valuable in the making of labor and material contracts, now therefore,

In consideration of one hundred forty (140) shares of stock of the Iowa-Wisconsin Bridge Company in hand paid by Third party, receipt of which is hereby acknowledged by First party and in consideration of the premises and provisions of this agreement, the First party does hereby agree to and by other endorsements does guarantee the cash payments required to be paid by the Second party to McClintic-Marshall Co. of Pittsburg and Industrial Contracting Company of Minneapolis according to contracts with said companies providing for work and material to build the Black Hawk Bridge at Lansing, Iowa.

In consideration of the premises and the values accruing to Second party from said guarantees by First party, the

Second party hereby agrees to meet and pay promptly when due all payments guaranteed by First party and Second party further agrees that it will pay on demand to First party any sums First party may be required to advance by reason of any of the endorsements or guarantees in connection with the building of the said Black Hawk Bridge.

In consideration of the premises and the benefits to Third party, by reason of any endorsements or guarantees of First party, the Third party hereby agrees that in event Second party fails to pay and discharge all of the payments aforesaid and or first party is required to advance any sums of money by reason of any endorsement or guarantee in connection with the financing of the said Black Hawk Bridge then and in that event the Third party agrees to pay to First party on demand a sum equal to the total amount due to First party from all causes in connection with said financing of said bridge:

It is agreed by all parties hereto that in addition to the principal sum, interest at the rate of 8% per annum will accrue and be payable upon and with all sums remaining unpaid to First party after March 1st, 1931, and that all sums advanced by First party hereunder shall become payable to First party on demand.

Second party agrees to provide a Standard Completion Bond guaranteeing Completion of the Bridge, Premium to be paid by first party.

It is agreed that First party may have access to all the books and records of Second and Third parties at any and all reasonable times for the purpose of inspecting and observing the progress of the work on the bridge and the payments therefor.

Third party agrees that First party may take over possession of and control of the Black Hawk Bridge and all work and management of all things in connection therewith at any time during any default of or any failure of Third party to promptly meet any payments herein required to it to be made and that First party may have and hold said Bridge and all things belonging thereto until said sums are paid in full as required hereunder.

Executed and entered into for the respective corporations by their duly authorized officers at Minneapolis, Minnesota this 10th day of November, 1930.

Attest:

PHOENIX FINANCE SYSTEM, INC.,

[fol. 428] By J. A. Thompson,

M. K. Thompson, President,
Secretary. Corporate Seal.

JOHN W. SHAFFER & COMPANY,
By John W. Shaffer,

A. U. Harting, President.
Secretary Corporate Seal.

M. E. Lockart,
Secretary.

IOWA-WISCONSIN BRIDGE
COMPANY,
By C. W. O'Connor,
Chairman of the Board.

That in and by said agreement and for the considerations therein mentioned, Phoenix Finance System, Inc. agreed to and did thereby guarantee the cash payments required to be made by John W. Shaffer & Company to McClintic Marshall Co. of Pittsburgh, and Industrial Contracting Company of Minneapolis, according to certain existing contracts between said John W. Shaffer & Company as principal contractor and said companies providing for labor and or materials to build the Black Hawk Bridge at Lansing, Iowa, owned by the defendant; that the said John W. Shaffer & Company in and by said agreement covenanted and agreed to meet and pay promptly when due all payments thus guaranteed by Phoenix Finance System, Inc. and to pay on demand to the said Phoenix Finance System, Inc. any sums that it might be required to advance by reason of its guarantees in connection with the building of said Black Hawk Bridge; and that the defendant, in consideration of the premises and the benefits to it, in and by said agreement covenanted and agreed that in the event John W. Shaffer & Company failed to pay and discharge all of the payments aforesaid and/or Phoenix Finance System, Inc. should be required to advance any sums of money

by reason of any endorsement or guarantee in connection with the finanding of said Black Hawk Bridge, that it, the said defendant, would pay to Phoenix Finance System, Inc. on demand a sum equal to the total amount due said [fol. 429] Phoenix Finance System, Inc. from all causes in connection with the said financing of said Bridge, together with interest at the rate of 8% per annum upon all sums remaining unpaid to the said Phoenix Finance System, Inc. after March 1, 1931.

And the said plaintiff further says that a statute of the State of Minnesota in full force and effect at all the times herein mentioned, the same being Chapter 70, Laws of Minnesota, 1923, provided as follows:

"The interest for any legal indebtedness shall be at the rate of six dollars upon one hundred dollars for a year, unless a different rate is contracted for in writing; and no person shall directly or indirectly take or receive in money, goods, or things in action, or in any other way, any greater sum, or any greater value, for the loan or forebearance of money, goods, or things in action, than eight dollars on one hundred dollars for one year; and in the computation of interest upon any bond, note, or other instrument or agreement interest shall not be compounded, but any contract to pay interest, not usurious, upon interest overdue, shall not be construed to be usury. Contracts shall bear the same rate of interest after they become due as before, and any provision in any increase therein after maturity, or any increase therein after making and delivery, shall work a forefeiture of the entire interest; but this provision shall not apply to notes or contracts which bear no interest before maturity."

And the said plaintiff further says that prior to the making of said agreement as aforesaid, a certain contract in writing had been entered into between the said John W. Shaffer & Company and McClintic-Marshall Co. dated November 8, 1930, in connection with which the payments due McClintic-Marshall Co. from John W. Shaffer & Company had been guaranteed by the said Phoenix Finance System, Inc.; that said contract and the guarantee of Phoenix

Finance System, Inc. was in words and figures as follows, to-wit:

"McCLINTIC-MARSHALL
COMPANY,
Steel Bridges, Buildings, Etc.

General Offices, Pittsburgh, Pa.

1416 First National Bank Building,
Chicago, Ill., Nov. 8, 1930.

Proposal-Contract
D-2945

To John W. Shaffer & Company,
Minneapolis, Minn.
(Hereinafter called the "Purchaser")

[fol. 430] The McClintic-Marshall Company, a Delaware Corporation hereinafter called the "Contractor," proposes, subject to the conditions herein, To Furnish and Deliver, f.o.b. cars its works with carload rate of freight alloed to Lansing, Iowa, the structural steelwork only for the Blackhawk Bridge at Lansing, Iowa, as shown on two unnumbered prints furnished by the Purchaser, and as further amplified by Purchaser's detail drawings #1 to 17 inclusive.

Trusses for cantilever arms and anchor arms will be subpunched and reamed. All other work will be full sized punched work.

The Contractor shall have the privilege of substituting equivalent sections for those specified, subject to approval of the Engineer of Bridge Co.

The price quoted herein is based on the present freight rate. Should this rate be increased before shipment, amount of the increase is to be paid for by the Purchaser.

Material shall be routed as the Purchaser directs, provided such routing entails no additional cost to the Contractor.

Shop Paint: One (1) coat brown Nocore.

Price: The Purchaser shall pay the Contractor in funds current at par in New York or Pittsburgh for the same work, labor, services, and materials the sum of Seventy-

three Dollars and fifty cents ($73.50) per ton of 2000 pounds.

Price is exclusive of all spotting, switching, or other delivery charges at destination.

Terms of Payment: On or about the last of each calendar month an estimate shall be made by the Contractor of the value of material received and of work fabricated and ready for shipment up to that time, which estimate shall be due and payable on the tenth (10th) of the month following.

If payments are based on unit weights, the total weight shall be calculated in accordance with the Code of Standard Practice of the American Institute of Settl Construction, Inc.

Information to Be Furnished by Purchaser: The Purchaser agrees to furnish within 30 days from date of acceptance of this Proposal, complete information necessary for ordering material and preparation of the shop drawings. Information for any provision in the structural steelwork for other trandes is to be furnished in such time as not to interfere with the preparation of the shop drawings.

Completion: The Contractor agrees to complete the shipment of the 90′ deck trusspans six (6) weeks after date of receipt of completely checked shop detail drawings, and to complete shipments of the entire work within ten (10) weeks after date of receipt of completely checked detail drawings by the Contractor, provided above information is furnished within the time above stipulated and that the Contractor is not delayed by strikes, fires, floods, storms, rolling mills, transportation, acts of civil or military authorities or other causes beyond his control.

No claims will be allowed for correction of alleged misfits unless notification is given the Contractor at the time and responsibility is proven. Ordinary inaccuracies of [fol. 431] shop work are not to be considered misfits.

Yours very truly,

McCLINTIC-MARSHALL COMPANY,
C. H. HARLAN,
Resident Contracting Manager.

Accepted:

JOHN W. SHAFFER & COMPANY,
By John W. Shaffer.

Date: November 8, 1930.

The payments for this work are hereby guaranteed by the Phoenix Finance System, Inc., a Delaware corporation.

PHOENIX FINANCE SYSTEM, INC.,
By J. A. Thompson, President.

Date: November 8, 1930."

And the said plaintiff further says that after the making of said agreement as aforesaid, a certain contract in writing was entered into between the said John W. Shaffer & Company and Industrial Contracting Company dated November 11, 1930, in connection with which the payments due Industrial Contracting Company from John W. Shaffer & Company were guaranteed by the said Phoenix Finance System, Inc.; that said contract and the Guarantee of Phoenix Finance System, Inc. was in words and figures as follows, to-wit:

"This Agreement, made and executed this 11th day of November, 1930, by and between Industrial Contracting Company, a corporation organized under the laws of the State of Minnesota, hereinafter referred to as 'Sub-Contractor,' party of the first part, and John W. Shaffer & Company, a corporation organized under the laws of the State of Minnesota, hereinafter referred to as 'Contractor,' party of the second part,

Witnesseth:

That Whereas, John W. Shaffer & Company on the 11th day of November, 1930, entered into a contract with Iowa-Wisconsin Bridge Company, a Delaware corporation, for the construction of the superstructure of a bridge across the Mississippi River between Lansing, Iowa and a point approximately two miles South of DeSoto, Wisconsin, said bridge being known as the 'Black Hawk Bridge,' and

[fol. 432] Whereas, said John W. Shaffer & Company desires to sublet to Industrial Contracting Company the contract for the completion of said bridge, and

Whereas, the completion of said bridge shall be considered as comprising the erecting of the steel superstructure extending from Pier No. 1 to Pier No. 9, together with floor system, furnishing material for and erecting pile trestles over Henderson, Indian, Stevens, Winneschiek and Big Sloughs, furnishing material for and erecting toll house and greasing pit at Lansing end of bridge (but not including any equipment for storing or handling gas or oil);

Now, Therefore, This Agreement Witnesseth:

That the sub-contractor agrees to erect for the contractor the foregoing in accordance with the plans and specifications hereto attached and made a part hereof and said contractor in consideration thereof agrees to pay said sub-contractor an amount equal to cost plus fifteen per cent; provided, however, that based on the quantities herein stated, the sub-contractor agrees that the maximum cost to the contractor shall not exceed the sum of One Hundred Forty-one Thousand Seven Hundred Thirty-four ($141,734.00) Dollars.

In the event that the cost plus fifteen per cent shall be less than the guaranteed maximum cost of $141,734.00, then the sub-contractor shall receive additional compensation equal to one-half of the difference between the actual cost plus fifteen per cent, and said guaranteed maximum cost of One Hundred Forty-one Thousand Seven Hundred Thirty-four Dollars ($141,734.00).

It Is Understood And Agreed that the quantities on which the guaranteed maximum cost is based and the unit prices to be applied to additions or deductions in quantities, in case there is a variation in same therefore it becomes necessary to increase or decrease the guaranteed macimum cost, are as follows:

1400 tons of Steel (erection only)—per ton	$29.00
Piling in place—11514 Lineal ft. at	.65
Timber in place—449,754 FBM at	60.00 Per M
Asphalt floor—39,325 sq. ft. at	0.103
Concrete—372 cu. yds. at	14.00

In case the actual quantities vary from those stated herein, the guaranteed maximum cost shall be increased or decreased accordingly, and the guaranteed maximum cost

so computed shall be used in place of One Hundred Forty-one Thousand Seven Hundred Thirty-four Dollars ($141,734.00) in determining the compensation due the sub-contractor.

The contractor agrees to pay the sub-contractor Seven Thousand Dollars ($7,000.00) on the signing of this agreement, and on the 1st and 15th day of each month thereafter to make payment to sub-contractor as called for by estimates approved by the engineer for the Iowa-Wisconsin Bridge Company, and such estimates shall cover all expenditures and commitments made by the sub-contractor during the preceding semi-monthly period which are chargeable to the cost of the work. The contractor also agrees to pay to the sub-contractor within fifteen days after the completion of the work, and approval of the same by the engineer for Iowa-Wisconsin Bridge Company, and on proof that all bills are paid, an amount equal to the difference between the sum of the payments already made and the total payments due the sub-contractor under the terms of this agreement.

[fol. 433] Extras shall be ordered in writing and the sub-contractor shall be paid for same either an agreed price, stated in the order, or cost plus fifteen per cent.

The sub-contractor shall secure all necessary workmen's compensation and public liability insurance. It is understood and agreed that the cost of the work shall include the cost of such insurance, the cost of the sub-contractor's bond, and all necessary labor, material, lumber, timber, falsework, working trestle, fuel, insurance, rental of equipment and tools, freight to and from job, temporary buildings and such other items as are customarily considered as part of the cost thereof, at all reasonable times.

It Is Understood and Agreed that, if previous to the completion of this contract, the contractor shall at any time fail to make payments to the sub-contractor as heretofore specified, and continues in default ten (10) days after receiving written notice to perform, then the sub-contractor shall be relieved from any further obligation hereunder; provided, however, that for all work theretofore done the sub-contractor shall be entitled to be paid on a basis of cost, plus fifteen per cent, as hereinbefore provided.

It Is Further Agreed that in figuring the cost of work performed, the following schedule of equipment rentals shall be applied:

Clam Shell—	$2.50 per day
Derrick including hoisting engine and boiler—	7.50 per day
Pile hammer—	2.50 per day
Concrete mixer and small concrete tools—	.40 per cu. yd.
Small tools for steel work	1.00 per ton steel
Compressor	10.00 per day
Pump	4.00 per day
Locomotive crane —	25.00 per day
Heavy timber tools	.50 per F.B.M.

Any equipment not listed above but found needed during construction will be charged to job at rental value governed by schedule established by Associated General Contractors of America.

Said contractor also agrees to furnish promptly to said sub-contractor such complete and reasonably detailed plans as the sub-contractor finds needed for the intelligent and rapid prosecution of the work. Said contractor also agrees to provide all field engineering, lines and grades.

Said contractor will, at its own expense, procure all necessary licenses, permits, franchises and rights of way. Said sub-contractor agrees to furnish a surety bond hereunder, the expense of the same to be included in the cost of the work.

The sub-contractor agrees to start work within three (3) days after the signing of this contract and the receipt from the contractor of the initial payment herein specified.

The sub-contractor agrees to proceed with the work so as to permit traffic over the bridge by March 10, 1931, provided that the shipping dates of the steeel—which is to be furnished and paid for by the contractor—are such as to permit the completion of the work by said date under the weather conditions which are then found to exist.

[fol. 434] It Is Mutually Agreed that this agreement comprises the entire contract between the parties hereto, and

that there are no representations or agreements by either party except as set forth in said contract.

In Witness Whereof, the parties hereto have caused these presents to be executed in their corporate names, by their proper officers thereunto duly authorized by resolutions of the Board of Directors of said corporations, certified copies of which resolutions are hereto attached.

INDUSTRIAL CONTRACTING COMPANY,
By A. F. Crounse, Its, Pres.

Attest: R. C. McGrail, its, Secy.

In present of:

B. M. Storey,
E. McGrail.

JOHN W. SHAFFER & COMPANY,
By John W. Shaffer, Its, Pres.

Attest: W. W. Harting, Its, Secy.

M. White,
Selma Holmberg.

In Consideration of the sum of One Dollar ($1.00) and other valuable consideration to it in hand paid by Industrial Contracting Company, and in order to induce said Industrial Contracting Company to enter into the attached contract between said Industrial Contracting Company and John W. Shaffer & Company, Phoenix Finance System, Inc., a corporation organized under the laws of the State of Delaware, does hereby guarantee, promise and agree to and with said Industrial Contracting Company that said John E. Shaffer & Company will faithfully and promptly pay all sums of money by it to be paid as set forth in the attached contract, at the times and in the manner therein provided.

Said Phoenix Finance System, Inc., expressly waives the making of any demand by said Industrial Contracting Company on said John W. Shaffer & Company for said payments, or any of them, and any notice of non-payment on the part of said John W. Shaffer & Company, it being the intention of said Phoenix Finance System, Inc., by the execution of this guarantee, to make itself liable for all pay-

ments to be made by said John W. Shaffer & Company to said Industrial Contracting Company under the attached contract in exactly the same manner as John W. Shaffer & Company is itself liable for said payments under the said terms of said contract.

In Testimony Whereof, the said Phoenix Finance System, Inc., has caused these presents to be executed in its corporate name, by its proper officers thereunto authorized, and its corporate seal to be hereunto affixed this 10 day of November, 1930.

(Corporate Seal) PHOENIX FINANCE SYSTEM, INC.
By J. H. Thompson, Its Pres.

Attest: M. K. Thompson, Its Secy.

Witnesses:
John W. Shaffer.

[fol. 435] Certificate.

I, M. K. Thompson, Secretary of Phoenix Finance System, Inc. do hereby certify that a special meeting of the Board of Directors of said corporation was held on the 10th day of November, 1930, of which meeting due notice was given to the members of said Board of Directors, and at which meeting a quorum of said Board was present, and the following resolution was unanimously adopted:

Resolved: That a certain contract between Phoenix Finance System, Inc. and the Industrial Contracting Company, providing for guaranteeing payment of certain sums covered by a certain agreement between the Industrial Contracting Company and John W. Shaffer & Company, bearing date November 10, 1930, and providing for the construction of the super-structure of the Black Hawk Bridge, be and the same is hereby approved, and the President and Secretary of this corporation are hereby authorized and directed to execute said contract on behalf of this corporation and to do all things necessary to put same into effect and consummation.

Signed this 10th day of November, A. D. 1930.

M. K. THOMPSON,
Secretary, Phoenix Finance System, Inc."

And the said plaintiff further says that the agreement of November 10, 1930, and the covenants and promises of the said Phoenix Finance System, Inc. therein contained, was and were with reference inter alia to the guarantees of the said Phoenix Finance System, Inc. of the aforesaid contracts between John W. Shaffer & Company and McClintic-Marshall Co. and Industrial Contracting Company respectively.

And the said plaintiff further says that John W. Shaffer & Company failed to pay and discharge its obligations under the aforesaid contracts and that, in pursuance of its obligations as guarantor of said contract, Phoenix Finance System, Inc. advanced to the defendant, for the express purpose of meeting and paying said obligations, in cash and marketable bonds of the United States of America, sums aggregating Twenty-one Thousand Two Hundred Sixty-two Dollars and Seventy-one ($21,262.71), lawful money of the United States of America, and that said sums were so advanced by said Phoenix Finance System, Inc. to the defendant and were used by the defendant with the consent and at the direction of Phoenix Finance System, Inc. for the purpose of paying the obligations of [fol. 436] John W. Shaffer & Company under the aforesaid contracts to McClintic-Marshall Co. and Industrial Contracting Company. Wherefore the said plaintiff says that in pursuance of the covenants and promises of Phoenix Finance System, Inc. under the agreement of November 10, 1930, said Phoenix Finance System, Inc. was required to advance and pay, and did advance and pay, by reason of its endorsements or guarantees in connection with the building of said Black Hawk Bridge the said sum (in cash or marketable bonds of the United States of America) of Twenty-one Thousand Two Hundred Sixty-two Dollars and Seventy-one Cents ($21,262.71), lawful money as aforesaid.

And the said plaintiff further says that thereafter, to-wit, on the 1st day of January, 1932, the said Phoenix Finance System, Inc. assigned, transferred and set over to the plaintiff all of its assets, including accounts receivable and choses in action, and that the plaintiff purchased the said assets of the said Phoenix Finance System, Inc. for

a valuable consideration and agreed to assume the liabilities of Phoenix Finance System, Inc. whereby the said plaintiff became vested and still is vested with all of the rights of Phoenix Finance System, Inc. under said agreement of November 10, 1930.

And the said plaintiff further says that John W. Shaffer & Company, in violation of the covenants and agreements on its part to be performed as aforesaid, has wholly failed to pay either to Phoenix Finance System, Inc. or to the plaintiff the sums that Phoenix Finance System, Inc. was required to advance by reason of its guarantees as aforesaid, or any part thereof, or any interest thereon, although often requested and demanded so to do.

And although said Phoenix Finance System, Inc., prior to the first day of January, 1932, and the said plaintiff since that date, have always from the time of making of said agreement hitherto well and truly performed, fulfilled and kept all things in said agreement contained on their [fol. 437] part and behalf to be performed, fulfilled and kept, according to the tenor and effect, true intent and meaning thereof, yet protesting that the said defendant has not performed, fulfilled or kept anything in said agreement contained on its part and behalf to be performed, fulfilled and kept, according to the tenor and effect, true intent and meaning thereof, the said plaintiff says that after the making of said agreement as aforesaid and after the payments by Phoenix Finance System, Inc. for the purpose of discharging its guarantees as aforesaid, the said defendant, although often demanded so to do, has hitherto wholly failed and refused and still does fail and refuse to pay to Phoenix Finance System, Inc. prior to January 1, 1932, or to the plaintiff since said date, the said sum of Twenty-one Thousand Two Hundred Sixty-two Dollars and Seventy-one Cents ($21,262.71) together with interest thereon at the rate of 8% per annum from March 1, 1931, contrary to the tenor and effect, true intent and meaning of said agreement and of the covenants of the said defendant in that behalf so made as aforesaid.

And so the plaintiff in fact says that the said defendant (although often requested so to do) has not kept the said covenants so made by it as aforesaid but has broken the

same, and to keep the same with the said Phoenix Finance System, Inc. and with the plaintiff as the assignor of Phoenix Finance System, Inc., has hitherto wholly neglected and refused, and still doth neglect and refuse, to the samage of the said plaintiff in the sum of Fifty Thousand Dollars ($50,000.00), lawful money of the United States of America, and therefore it brings its suit, &c.

MARVEL, MORFORD & LOGAN,
Attorneys for Plaintiff.

[fol. 438] Agreement Sued Upon In This Action

Agreement

This agreement made and entered into in triplicate by and between Phoenix Finance System, Inc., first party, and John W. Shaffer & Company, second party, and Iowa-Wisconsin Bridge Company, third party, witnesseth:

Whereas, First party has large financial means, Second party has contracted to build the Black Hawk Bridge at Lansing, Iowa and the Third party is owner of the Black Hawk Bridge, and

Whereas endorsements are necessary and valuable in the making of labor and material contracts, now therefore,

In consideration of one hundred forty (140) shares stock of the Iowa Wisconsin Bridge Company in hand, paid by Third party, receipt of which is hereby acknowledged by First party and in consideration of the premises and provisions of this agreement, the First party does hereby agree to and by other endorsements does guarantee the cash payments required to be paid by the Second party to McClintic-Marshall Co. of Pittsburg and Industrial Contracting Company of Minneapolis according to contracts with said companies providing for work and material to build the Black Hawk Bridge at Lansing, Iowa.

In consideration of the premises and the values accruing to Second party from said guarantees by First party, the Second party hereby agrees to meet and pay promptly when due all payments guaranteed by First party and Second party further agrees that it will pay on demand to

First party any sums First party may be required to advance by reason of any of the endorsements or guarantees in connection with the building of the said Black Hawk Bridge.

In consideration of the premises and the benefits to Third party, by reason of any endorsements or guarantees [fol. 439] of First party, the Third party hereby agrees that in event Second party fails to pay and discharge all of the payments aforesaid and/or first party is required to advance any sums of money by reason of any endorsement or gurantee in connection with the financing of the said Black Hawk Bridge then and in that event the Third party agrees to pay to First party on demand a sum equal to the total amount due to First party from all causes in connection with said financing of said bridge.

It is agreed by all parties hereto that in addition to the principal sum, interest at the rate of 8% per annum will accrue and be payable upon and with all sums remaining unpaid to First party after March 1st, 1931, and that all sums advanced by First party hereunder shall become payable to First party on demand.

Second party agrees to provide a Standard Completion Bond guaranteeing completion of the Bridge, Premium to be paid by First party.

It is agreed that First party may have access to all the books and records of Second and Third parties at any and all reasonable times for the purpose of inspecting and observing the progress of the work on the bridge and the payments therefor.

Third party agrees that First party may take over possession of and control of the Black Hawk Bridge and all work and management of all things in connection therewith at any time during any default of or any failure of Third party to promptly meet any payments herein required of it to be made and that First party may have and hold said Bridge and all things belonging thereto until said sums are paid in full as required hereunder.

Executed and entered into for the respective corporations by their duly authorized officers at Minneapolis, Minnesota this 10th day of November, 1930.

Corporate Seal

PHOENIX FINANCE SYSTEM, INC.,
By J. A. Thompson,
President.

Attest:

M. K. Thompson,
Secretary.

[fol. 440]

JOHN W. SHAFFER & COMPANY,
By John W. Shaffer,
President.

Corporate Seal

A. U. Harting,
Secretary.

IOWA-WISCONSIN BRIDGE COMPANY,
By C. W. O'Connor
Chairman of the Board.

Corporate Seal

M. E. Lockhart,
Secretary.

[fol. 441] State of Delaware,
New Castle County—ss.:

I, Martin G. Hannigan, Prothonotary of the Superior Court of the State of Delaware, in and for New Castle County, do hereby certify that the foregoing pages contain a true copy of the Writ together with the Narr filed in the case there stated as the same now remains in the Superior Court of the said State, at Wilmington.

In testimony whereof, I hereunto set my hand and affix the seal of the said Court, this Sixteenth day of February A. D. One thousand nine hundred and forty.

MARTIN G. HANNIGAN,
(Seal) Prothonotary.

State of Delaware, to-wit:—

I, Daniel J. Layton, Chief Justice of the State of Delaware, and as such, the Presiding Judge of the Superior Court of the said State, do hereby certify that the foregoing Record and attestation, made by Martin G. Hannigan Esq., Prothonotary of the said Court, within the County of New Castle, whose name is thereto subscribed, and to which the seal of said Court is affixed, are in due form, and made by the proper officer.

In testimony whereof, I hereunto set my hand, this Sixteenth day of February A. D. One thousand nine hundred and forty.

DANIEL J. LAYTON,
Chief Justice.

[fol. 442] State of Delaware,
New Castle County—ss.:

I, Martin G. Hannigan, Prothonotary of the Superior Court of the State of Delaware, in and for the County of New Castle, do certify that the Honorable Daniel J. Layton, Esquire, by whom the foregoing attestation was made, and whose name is thereto subscribed, was at the time of making thereof, and still is, Chief Justice of the State of Delaware, and, as such, the Presiding Judge of the Superior Court of the said State, duly commissioned and sworn, to all whose acts, as such, full faith and credit are, and ought to be, given, as well in Courts of Justice as elsewhere.

In testimony whereof, I hereunto set my hand and affix the seal of the said Court, this Sixteenth day of February A. D. One thousand nine hundred and forty.

MARTIN G. HANNIGAN,
(Seal) Prothonotary.

Filed in the District Court March 20, 1940.

[fol. 443] (Exhibit S. C. 5.)

New Castle County.—ss.:

The State of Delaware,

To the Sheriff of New Castle County,—Greeting:

Seal

We Command You, That you summon Iowa-Wisconsin Bridge Company a corporation duly organized and existing under the laws of the State of Delaware late of your County company so that it be and appear before the Judges of our Superior Court at Wilmington, on Monday, the Eighteenth day of September next to answer Phoenix Finance Corporation a corporation duly organized and existing under the laws of the State of Delaware of a plea of trespass on the case, etc.

And have you then there this Writ.

Witness, the Honorable Daniel J. Layton, at Wilmington, the First day of May in the year of our Lord one thousand nine hundred and thirty-nine.

Issued July 11, 1939.

MARTIN G. HANNIGAN,
Prothonotary.

[fol. 444] Summoned Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware, by serving the within writ personally upon and leaving a copy of same with Charles S. Peabbleo, Assistant Secretary of Corporation Trust Company, a Delaware corporation, said Corporation Trust Company, a corporation as aforesaid, being Corporate Resident Agent in the State of Delaware for the said Iowa-Wisconsin Bridge Company, a corporation as aforesaid, on the fourteenth day of July A. D. 1939. The President or other head Officers of the said Iowa-Wisconsin Bridge

Company, a corporation as aforesaid, not being found within the State of Delaware,

So Answers,

SAMUEL M. FORD,
Sheriff.

Cost .75
Mlg. .10
.85

Sept. Term, A. D. 1939.

Phoenix Finance Corporation a corporation duly organized and existing under the laws of the State of Delaware,

No. 79 vs.

Iowa-Wisconsin Bridge Company a corporation duly organized and existing under the laws of the State of Delaware.

(Copy)

Sum Case

MM&L, Esq.

Pro.q.

[fol. 445] Exhibit 5

In the Superior Court of the State of Delaware in and for New Castle County

Summons Debt

September Term 1939.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 79 vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

State of Florida,
County of Pinellas—ss.:

Before Me, Clementing Japour, a Notary Public for the State of Florida and the County aforesaid, personally comes M. K. Thompson, Treasurer of Phoenix Finance

Corporation, the plaintiff above named, who being by me duly sworn according to law, deposes and says:

That she is Treasurer of Phoenix Finance Corporation, the said plaintiff; that the plaintiff is the owner and holder of the bonds sued upon in this action and hereinafter more particularly described; that annexed hereto are true and correct copies of the bonds sued upon in this action, the same being First Mortgage 6% Gold Bonds, Series B, of Iowa-Wisconsin Bridge Company, each in the denomination of Five Hundred Dollars ($500.00) each dated February 1, 1932, and bearing Nos. 93 and 97 respectively; that the defendant wholly failed to pay the installment of interest on said Series B Bonds, including the bonds sued upon in this action, due August 1, 1933; that said default in the payment of interest having occurred and having continued for a period of sixty days, Bechtel Trust Company and A. H. Schubert, Trustees named in the Indenture of Mortgage Deed of Trust securing the issue of bonds of which the above mentioned bonds were a part, on the 13th day of July, 1933, by notice in writing to the defendant, declared the said defendant in default and the principal of all such bonds, including the bonds sued upon in this action, [fol. 446] to be due and payable immediately.

That the sum demanded of the said defendant is the sum of One Thousand Dollars ($1000.00) with interest at the rate of six per centum per annum from the 1st day of February, 1933, and said deponent further says that she verily believes that the same is justly and truly due from the said defendant to the said plaintiff.

M. K. THOMPSON.

Sworn to and subscribed before me, this 31st day of July A. D. 1939.

CLEMENTINE JAPOUR,
(Seal) Notary Public.

[fol. 447]

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing	On the 1st Day of Feb. 1942 No. 93 $15.00 No. 20

on January First, 1932, without deduction for taxes except succession and inheritance taxes, and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

OSCAR R. THORSON,
Treasurer.

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes except succession and inheritance taxes, and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

On the 1st Day of Aug. 1941
No. 93
$15.00
No. 19

OSCAR R. THORSON,
Treasurer.

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes except succession and inheritance taxes, and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series

On the 1st Day of Feb. 1941
No. 93
$15.00
No. 18

B, unless said bond shall have been called for previous redemption.

OSCAR R. THORSON,
Treasurer.

[fol. 448]

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes except succession and inheritance taxes, and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

On the 1st Day of Aug. 1940
No. 93
$15.00
No. 17

OSCAR R. THORSON,
Treasurer.

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes except succession and inheritance taxes, and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

On the 1st Day of Feb. 1940
No. 93
$15.00
No. 16

OSCAR R. THORSON,
Treasurer.

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes except succession and inheritance taxes, and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

OSCAR R. THORSON,
Treasurer.

On the 1st Day of Aug. 1939 No. 93 $15.00 No. 15

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes except succession and inheritance taxes, and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

OSCAR R. THORSON,
Treasurer.

On the 1st Day of Feb. 1939 No. 93 $15.00 No. 14

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes except succession and inheritance taxes, and that portion of any federal income tax

On the 1st Day of Aug. 1938 No. 93 $15.00 No. 13

which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

OSCAR R. THORSON,
Treasurer.

[fol. 449]

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes except succession and inheritance taxes, and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

On the 1st Day of Feb. 1938 No. 93 $15.00 No. 12

OSCAR R. THORSON,
Treasurer.

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes except succession and inheritance taxes, and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

On the 1st Day of Aug. 1937 No. 93 $15.00 No. 11

OSCAR R. THORSON,
Treasurer.

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes except succession and inheritance taxes, and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

On the 1st Day of Feb. 1937 No. 93 $15.00 No. 10

OSCAR R. THORSON,
Treasurer.

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes except succession and inheritance taxes, and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

On the 1st Day of Aug. 1936 No. 93 $15.00 No. 9

OSCAR R. THORSON,
Treasurer.

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes except succession and inheritance taxes,

On the 1st Day of Feb. 1936 No. 93 $15.00 No. 8

and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

OSCAR R. THORSON,
Treasurer.

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes except succession and inheritance taxes, and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

On the 1st Day of Aug. 1935 No. 93 $15.00 No. 7

OSCAR R. THORSON,
Treasurer.

[fol. 450]

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes except succession and inheritance taxes, and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

On the 1st Day of Feb. 1935 No. 93 $15.00 No. 6

OSCAR R. THORSON,
Treasurer.

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes except succession and inheritance taxes, and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

On the 1st Day of Aug. 1934 No. 93 $15.00 No. 5

OSCAR R. THORSON,
Treasurer.

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes except succession and inheritance taxes, and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

On the 1st Day of Feb. 1934 No. 93 $15.00 No. 4

OSCAR R. THORSON,
Treasurer.

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes except succession and inheritance taxes,

On the 1st Day of Aug. 1933 No. 93 $15.00 No. 3

and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

OSCAR R. THORSON,
Treasurer.

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes except succession and inheritance taxes, and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

On the 1st Day of Aug. 1944
No. 93
$15.00
No. 25

OSCAR R. THORSON,
Treasurer.

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes except succession and inheritance taxes, and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

On the 1st Day of Feb. 1944
No. 93
$15.00
No. 24

OSCAR R. THORSON,
Treasurer.

[fol. 451]

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes except succession and inheritance taxes, and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

On the 1st Day of Aug. 1943
No. 93
$15.00
No. 23

OSCAR R. THORSON,
Treasurer.

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes (except succession and inheritance taxes, and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

On the 1st Day of Feb. 1943
No. 93
$15.00
No. 22

OSCAR R. THORSON,
Treasurer.

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Becht· Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes (except succession and inheritance taxes,

On the 1st Day of Aug. 1942
No. 93
$15.00
No. 21

and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

OSCAR R. THORSON,
Treasurer.

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes (except succession and inheritance taxes, and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

On the 1st Day of Feb. 1945
No. 93
$15.00
No. 26

OSCAR R. THORSON,
Treasurer.

[fol. 452] $500 $500

State of Delaware
Iowa-Wisconsin Bridge Company
First Mortgage Gold Bond
Six Per Cent

Series B Due February 1, 1945

Iowa-Wisconsin Bridge Company, (hereinafter called the Company) for value received, hereby promises to pay on the First day of February, A. D. 1934, (unless this bond be sooner redeemed as hereinafter provided) to bearer, or if registered, to the registered owner of this bond, at the office of Bechtel Trust Company in the City of Davenport, Iowa,

Five Hundred Dollars ($500.00)

in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932,

and to pay interest thereon from February First, 1932, at the rate of six per centum (6%) per annum, such interest to be payable at the office of said Trust Company, in like gold coin, semi-annually on the First day of February, and the First day of August, in each year, upon presentation and surrender, as they severally mature, of the coupons for such interest hereto annexed.

All payments on this bond, both of principal and interest, shall be made without deduction for any tax, assessment or other governmental charge (except succession and inheritance taxes, and that portion of any federal income tax which may be in excess of two per centum (2%) of such interest) which the company, its successors or assigns, may be required to pay thereon, or authorized to deduct or retain therefrom, under any present or future law or requirement of the United States of America, or of any state, county, municipality or other taxing authority therein.

This Bond is one of the duly authorized issue of bonds of the Company, of the series and designation indicated on the face hereof, which issue of bonds consists or may consist of several series of varying denominations, dates and tenor, all of which said bonds have been issued or are to be issued, under and in pursuance of, and (except as to any sinking fund which may be established for the exclusive benefit of one or more particular series of such bonds), are all equally and ratably secured by an Indenture of Mortgage Deed of Trust, dated January First 1932, duly executed by the Company to Bechtel Trust Company and A. H. Schubert, Trustees, to which Indenture reference is hereby made for a description of the property thereby mortgaged, the nature and extent of the security thereby created, and the rights of the holders of said bonds in respect of such security.

In case of default in the payment of any installment of interest on any bond of said issue and the continuance thereof for a period of sixty days, the principal of all the bonds of said issue may be declared due and payable, otherwise be declared due and payable, prior to such maturity, upon the occurrence and continuance of default, as in said Indenture provided.

This Bond may, at the option of the Company, be redeemed on any interest date, prior to its regular maturity, after notice by publication in the City of Davenport, Iowa, once a week for four successive weeks, by paying the principal hereof, and the interest accrued hereon, to the date fixed for such redemption, plus a premium of one per centum (1%) of the principal, all in the manner and upon the conditions provided in said Indenture.

No recourse shall be had for the payment of the principal of or interest on this bond against any incorporator, stockholder, director, or officer of the Company, past present or future, either directly or through the Company, by virtue of any statute or constitution or by the enforcement of any assessment or penalty, or otherwise howsoever; any and all liability of incorporation, stockholders, directors and officers of the Company being hereby waived and released by each successive holder of this Bond.

[fol. 453] This Bond shall pass by delivery, unless registered in the owner's name on registration books of the Company, to be kept at the office of Bechtel Trust Company in the City of Davenport, Iowa, such registration being noted hereon by said Trust Company, after which no transfer shall be valid unless made on said books in the manner prescribed in said Indenture and similarly noted hereon; but the same may be discharged from registry by being transferred in like manner to bearer, after which transferability by delivery shall be restroed and again, from time to time, it may be registered or transferred to bearer as before. Such registration, however, shall not affect the transferability of the coupons for the interest hereon by delivery merely, and payment to the bearer thereof shall discharge the Company in respect of the interest therein mentioned whether or not the bond shall have been registered.

Neither this Bond nor any of the coupons for interest thereon, shall become or be valid until the bond shall have been authenticated by the certificate endorsed hereon, duly signed by Bechtel Trust Company, one of the Trustees under said Indenture, or by its successor in said trust.

In Witness Whereof, Iowa-Wisconsin Bridge Company has caused this Bond to be signed by its President or Vice President and its corporate seal to be hereunto affixed, and to be attested by its Secretary, and the coupons for such interest bearing the facsimile signature of its Treasurer, to be attached hereto as of the First day of February, A. D. 1932.

IOWA-WISCONSIN BRIDGE COMPANY,
By Emory H. English, President.

Attest:

Oscar R. Thorson,
Secretary.

[fol. 454]

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes (except succession and inheritance taxes, and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

On the 1st Day of Feb. 1942 No. 97 $15.00 No. 20

OSCAR R. THORSON,
Treasurer.

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes (except succession and inheritance taxes, and that portion of any federal income tax

On the 1st Day of Aug. 1941 No. 97 $15.00 No. 19

which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

OSCAR R. THORSON,
Treasurer.

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes (except succession and inheritance taxes, and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

On the 1st Day of Feb. 1941 No. 97 $15.00 No. 18

OSCAR R. THORSON,
Treasurer.

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes (except succession and inheritance taxes, and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

On the 1st Day of Aug. 1940 No. 97 $15.00 No. 17

OSCAR R. THORSON,
Treasurer.

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes (except succession and inheritance taxes, and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

On the 1st Day of Feb. 1940 No. 97 $15.00 No. 16

OSCAR R. THORSON,
Treasurer.

[fol. 455]

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes (except succession and inheritance taxes, and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

On the 1st Day of Aug. 1939 No. 97 $15.00 No. 15

OSCAR R. THORSON,
Treasurer.

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes (except succession and inheritance taxes,

On the 1st Day of Feb. 1939 No. 97 $15.00 No. 14

and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

OSCAR R. THORSON,
Treasurer.

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes (except succession and inheritance taxes, and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

On the 1st Day of Aug. 1938
No. 97
$15.00
No. 13

OSCAR R. THORSON,
Treasurer.

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes (except succession and inheritance taxes, and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

On the 1st Day of Feb. 1938
No. 97
$15.00
No. 12

OSCAR R. THORSON,
Treasurer.

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes (except succession and inheritance taxes, and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

On the 1st Day of Aug. 1937 No. 97 $15.00 No. 11

OSCAR R. THORSON,
Treasurer.

[fol. 456]

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes (except succession and inheritance taxes, and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

On the 1st Day of Feb. 1937 No. 97 $15.00 No. 10

OSCAR R. THORSON,
Treasurer.

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes (except succession and inheritance taxes,

On the 1st Day of Aug. 1936 No. 97 $15.00 No. 9

and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

OSCAR R. THORSON,
Treasurer.

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes (except succession and inheritance taxes, and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

On the 1st Day of Feb. 1936 No. 97 $15.00 No. 8

OSCAR R. THORSON,
Treasurer.

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes (except succession and inheritance taxes, and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

On the 1st Day of Aug. 1935 No. 97 $15.00 No. 7

OSCAR R. THORSON,
Treasurer.

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes (except succession and inheritance taxes, and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

On the 1st Day of Feb. 1935 No. 97 $15.00 No. 6

OSCAR R. THORSON,
Treasurer.

[fol. 457]

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes (except succession and inheritance taxes, and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

On the 1st Day of Aug. 1934 No. 97 $15.00 No. 5

OSCAR R. THORSON,
Treasurer.

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes (except succession and inheritance taxes,

On the 1st Day of Feb. 1934 No. 97 $15.00 No. 4

and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

OSCAR R. THORSON,
Treasurer.

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes (except succession and inheritance taxes, and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

On the 1st Day of Aug. 1933
No. 97
$15.00
No. 3

OSCAR R. THORSON,
Treasurer.

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes (except succession and inheritance taxes, and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

On the 1st Day of Feb. 1945
No. 97
$15.00
No. 26

OSCAR R. THORSON,
Treasurer.

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes (except succession and inheritance taxes, and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

On the 1st Day of Aug. 1944
No. 97
$15.00
No. 25

OSCAR R. THORSON,
Treasurer.

[fol. 458]

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes (except succession and inheritance taxes, and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

On the 1st Day of Feb. 1944
No. 97
$15.00
No. 24

OSCAR R. THORSON,
Treasurer.

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes (except succession and inheritance taxes,

On the 1st Day of Aug. 1943
No. 97
$15.00
No. 23

and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

OSCAR R. THORSON,
Treasurer.

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes (except succession and inheritance taxes, and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

On the 1st Day of Feb. 1943 No. 97 $15.00 No. 22

OSCAR R. THORSON,
Treasurer.

Iowa-Wisconsin Bridge Company will pay the bearer hereof at the office of Bechtel Trust Company in the City of Davenport, Iowa Fifteen and no/100 Dollars ($15.00) in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, without deduction for taxes (except succession and inheritance taxes, and that portion of any federal income tax which may be in excess of two per centum (2%) hereof) being semi-annual interest then due upon its First Mortgage Gold Bond, Series B, unless said bond shall have been called for previous redemption.

On the 1st Day of Aug. 1942 No. 97 $15.00 No. 21

OSCAR R. THORSON,
Treasurer.

Iowa-W

[fol. 459] $500 $500

State of Delaware
Iowa-Wisconsin Bridge Company
First Mortgage Gold Bond
Six Per Cent

Series B Due February 1, 1945

Iowa-Wisconsin Bridge Company (hereinafter called the Company) for value received, hereby promises to pay on the First day of February, A. D. 1945 (unless this bond be sooner redeemed as hereinafter provided) to bearer, or if registered, to the registered owner of this bond, at the office of Bechtel Trust Company in the City of Davenport, Iowa

Five Hundred Dollars ($500.00)

in gold coin of the United States of America of the standard of weight and fineness existing on January First, 1932, and to pay interest thereon from February First, 1932, at the rate of six per centum (6%) per annum, such interest to be payable at the office of said Trust Company, in like gold coin, semi-annuually on the First day of February, and the First day of August, in each year, upon presentation and surrender, as they severally mature, of the coupons for such interest hereto annexed.

All payments on this bond, both of principal and interest, shall be made without deduction for any tax, assessment or other governmental charge (except succession and inheritance taxes, and that portion of any federal income tax which may be in excess of two per centum (2%) of such interest) which the Company, its successors or assigns, may be required to pay thereon, or authorized to deduct or retain therefrom, under any present or future law or requirement of the United States of America, or of any state, county, municipality or other taxing authority therein.

This bond is one of the duly authorized issue of bonds of the Company, of the series and designation indicated on the face hereof, which issue of bonds consists or may consist of several series of varying denominations, dates and tenor, all of which said bonds have been issued or are to be issued, under and in pursuance of, and (except as to any

sinking fund which may be established for the exclusive benefit of one or more particular series ~~(except as to any)~~ of such bonds), and are all equally and ratably secured by an Indenture of Mortgage Deed of Trust, dated January First, 1932, duly executed by the Company to Bechtel Trust Company and A. H. Schubert, Trustees, to which Indenture reference is hereby made for a description of the property thereby mortgaged, the nature and extent of the security thereby created, and the rights of the holders of said bonds in respect of such security.

In case of default in the payment of any installment of interest on any bond of said issue and the continuance thereof for a period of sixty days, the principal of all the bonds of said issue may be declared due and payable, prior to their regular maturity, in the manner and upon the conditions expressed in said Indentures; and may otherwise be declared due and payable, prior to such maturity, upon the occurrence and continuance of default, as in said Indenture provided.

This Bond may, at the option of the Company, be redeemed on any interest date, prior to its regular maturity, after notice by publication in the City of Davenport, Iowa, once a week for four successive weeks, by paying the principal hereof, and the interest accrued hereon, to the date fixed for such redemption, plus a premium of one per centum (1%) of the principal, all in the manner and upon the conditions provided in said Indenture.

No recourse shall be had for the payment of the principal of or interest on this bond against any incorporator, stockholder, director, or officer of the Company, past, [fol. 460] present or future, either directly or through the Company, by virtue of any statute or constitution, or by the enforcement of any assessment or penalty, or otherwise howsoever; any and all liability of incorporators, stockholders, directors and officers of the Company being hereby waived and released by each successive holder of this Bond.

This Bond shall pass by delivery, unless registered in the owner's name on registration books of the Company, to be kept at the office of Bechtel Trust Company, in the City of Davenport, Iowa, such registration being noted hereon

by said Trust Company, after which no transfer shall be valid unless made on said books in the manner prescribed in said Indenture and similarly noted hereon; but the same may be discharged from registry by being transferred in like manner to bearer, after which transferability by delivery shall be restored and again, from time to time, it may be registered or transferred to bearer as before. Such registration, however, shall not affect the transferability of the coupons for the interest hereon by delivery merely, and payment to the bearer thereof shall discharge the Company in respect of the interest therein mentioned whether or not the bond shall have been registered.

Neither this Bond nor any of the coupons for interest thereon, shall become or be valid until the bond shall have been authenticated by the certificate endorsed hereon, duly signed by Bechtel Trust Company, one of the Trustees under said Indenture, or by its successor in said trust.

In Witness Whereof, Iowa-Wisconsin Bridge Company, has caused this Bond to be signed by its President or Vice President and its corporate seal to be hereunto affixed, and to be attested by its Secretary, and the coupons for such interest be ring the facsimile signature of its Treasurer, to be attached hereto as of the First day of February A. D. 1932.

IOWA-WISCONSIN BRIDGE COMPANY,

EMORY H. ENGLISH, President.

OSCAR R. THORSON, Secretary.

[fol. 461] Exhibit 5-a.

In the Superior Court of the State of Delaware in and for New Castle County.

September Term 1939.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 79. vs.

Iowa-Wisconsin Dridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

The plaintiff above named, by Marvel, Morford & Logan, its attorneys, says that it has mistaken the form of action suited to its claim in the above cause, and moves that it be permitted to amend the form of the above action from an action of case to an action of debt, that being the form of action suited to its claim.

MARVEL, MORFORD & LOGAN,
Attorneys for Plaintiff.

And Now, To-Wit, this 18th day of September, A. D. 1939, the within motion having been considered by the Court, the same is allowed, and the form of the within action is changed from an action of case to an action of debt.

(S. L.) F. L. SPEAKMAN,
J.

[fol. 462] In the Superior Court of the State of Delaware in and for New Castle County.

September Term 1939.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 79. vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

New Castle County—ss.

Iowa-Wisconsin Bridge Company, a corporation as aforesaid, the defendant above named, was summoned to answer Phoenix Finance Corporation, a corporation as aforesaid, the plaintiff above named, of a plea that it render to the said plaintiff the sum of Two Thousand Dollars ($2,000.00), lawful money of the United States of America, which it owes to and unjustly detains from it, whereupon the said plaintiff, by Marvel, Morford & Logan, its attorneys, complains:

1. For That Whereas, the said defendant, heretofore, to-wit, on the first day of February, A. D. 1932, at the County of Scott, State of Iowa, to-wit, at the County of

New Castle aforesaid, by its certain writing obligatory, sealed with its seal, known as Iowa-Wisconsin Bridge Company First Mortgage Gold Bond, Series B, No. 93, acknowledged itself to be held and firmly bound to the bearer thereof, or if registered, to the registered owner thereof, at the office of Bechtel Trust Company in the City of Davenport, Iowa, in the sum of Five Hundred Dollars ($500.00) above demanded, to be paid to such bearer or registered owner on the First day of February, A. D. 1945, in gold coin of the United States of America of the standard of weight and fineness existing on January 1, 1932, and to pay interest [fol. 463] thereon from February 1, 1932 at the rate of 6% per annum, such interest to be payable at the office of said Trust Company in like gold coin semi-annually on the first day of February and the first day of August in each year upon presentation and surrender as they severally mature of the coupons for such interest annexed to said writing obligatory, and the said plaintiff further says that the obligations of the defendant in and by said writing obligatory were subject to certain terms and conditions therein expressed, indluding inter alia the following:

"In case of default in the payment of any installment of interest on any bond of said issue and the continuance thereof for a period of sixty days, the principal of all the bonds of said issue may be declared due and payable, prior to their regular maturity, in the manner and upon the conditions expressed in said Indenture; and may otherwise be declared due and payable, prior to such maturity, upon the occurrence and continuance of default, as in said Indenture provided."

And the said plaintiff further says that said writing obligatory was not registered and that the defendant wholly failed and refused to pay to the owner, holder or bearer thereof the interest due on the first day of August, 1933, although said owner, holder or bearer duly presented and surrendered the coupon for such interest for payment, according to the tenor and effect of said writing obligatory; that such default in the payment of interest having occurred and having continued for a period of sixty days, Bechtel Trust Company and A. H. Schubert, Trustees

named in the Indenture of Mortgage Deed of Trust securing the issue of bonds of which the writing obligatory herein mentioned was a part, on the 13th day of July, A. D. 1933, by notice in writing to the defendant declared the said defendant in default and the principal of all such bonds, including the writing obligatory sued upon in this action, to be due and payable immediately.

And the said plaintiff further says that it is the owner and holder of the writing obligatory sued upon in this action and the bearer thereof, according to the tenor and [fol. 464] effect of the same, and that the said defendant (although often requested so to do) has not as yet paid the said sum of Five Hundred Dollars ($500.00), parcel of the sum above demanded, or interest thereon, according to the tenor and effect of said writing obligatory, or any part thereof, to the plaintiff as such bearer of said writing obligatory, or to any bearer thereof, after the declaration of said default but has hitherto wholly neglected and refused and still neglects and refuses so to do. Wherefore the said plaintiff says that it is injured and has sustained damage to the amount of One Thousand Dollars ($1,000.00), lawful money of the United States of America, and therefore it brings its suit, &c.

And the said plaintiff brings here into Court the said writing obligatory sealed as aforesaid, which gives sufficient evidence to the Court here of the debt aforesaid, in the form aforesaid, the date whereof is the day and year in that behalf above mentioned. A true and correct copy of said writing obligatory designated "Copy of Instrument of Writing Sued Upon —A," is attached hereto and by this reference the same and the several terms and conditions thereof are made a part of this court of this declaration.

2. And Whereas Also, the said defendant, heretofore, to-wit, on the first day of February, A. D. 1932, at the County of Scott, State of Iowa, to-wit, at the County of New Castle aforesaid, by its certain writing obligatory, sealed with its seal, known as Iowa-Wisconsin Bridge Company First Mortgage Gold Bond, Series B, No. 97, acknowledged itself to be held and firmly bound to the bearer thereof, or if registered, to the registered owner thereof, at the

office of Bechtel Trust Company in the City of Davenport, Iowa, in the sum of Five Hundred Dollars ($500.00) above demanded, to be paid to such bearer or registered owner on the first day of February, A. D. 1945, in gold coin of the United States of America of the standard of weight and fineness existing on January 1, 1932, and to pay interest thereon from February 1, 1932 at the rate of 6% per an- [fol. 465] num, such interest to be payable at the office of said Trust Company in like gold coin semi-annually on the first day of February and the first day of August in each year upon presentation and surrender as they severally mature of the coupons for such interest annexed to said writing obligatory, and the said plaintiff further says that the obligations of the defendant in and by said writing obligatory were subject to certain terms and conditions therein expressed, including inter alia the following:

"In case of default in the payment of any installment of interest on any bond of said issue and the continuance thereof for a period of sixty days, the principal of all the bonds of said issue may be declared due and payable, prior to their regular maturity, in the manner and upon the conditions expressed in said Indenture; and may otherwise be declared due and payable, prior to such maturity, upon the occurrence and continuance of default, as is said Indenture provided."

And the said plaintiff further says that said writing obligatory was not registered and that the defendant wholly failed and refused to pay to the owner, holder or bearer thereof the interest due on the first day of August, 1933, although said owner, holder or bearer duly presented and surrendered the coupon for such interest for payment, according to the tenor and effect of said writing obligatory; that such default in the payment of interest having occurred and having continued for a period of sixty days, Bechtel Trust Company and A. H. Schubert, Trustees named in the Indenture of Mortgage Deed of Trust securing the issue of bonds of which the writing obligatory herein mentioned was a part, on the 13th day of July, A. D. 1933, by notice in writing to the defendant declared the said defendant in default and the principal of all such bonds, including the writing obligatory sued upon in this action, to be due and payable immediately.

And the said plaintiff further says that it is the owner and holder of the writing obligatory sued upon in this action and the bearer thereof, according to the tenor and effect of the same, and that the said defendant (although often requested so to do) has not as yet paid the said sum of Five Hundred Dollars ($500.00), parcel of the sum above [fol. 466] demanded, or interest thereon, according to the tenor and effect of said writing obligatory, or any part thereof, to the plaintiff as such bearer of said writing obligatory, or to any bearer thereof, after the declaration of said default but has hitherto wholly neglected and refused and still neglects and refuses so to do. Wherefore the said plaintiff says that it is injured and has sustained damage to the amount of One Thousand Dollars ($1,000.00) lawful money of the United States of America, and therefore it brings its suit, &c.

And the said plaintiff brings here into Court the said writing obligatory sealed as aforesaid, which gives sufficient evidence to the Court here of the debt aforesaid, in the form aforesaid, the date whereof is the day and year in that behalf above mentioned. A true and correct copy of said writing obligatory designated "Copy of Instrument of Writing Sued Upon -B," is attached hereto and by this reference the same and the several terms and conditions thereof are made a part of this count of this declaration.

MARVEL, MORFORD & LOGAN,
Attorneys for Plaintiff.

[fol. 467] State of Delaware,
New Castle County—ss.:

I, Martin G. Hannigan, Prothonotary of the Superior Court of the State of Delaware, in and for New Castle County, do hereby certify that the foregoing pages contain a true copy of the Affidavit of Demand & Writ together with the Narr filed in the case there stated as the same now remains in the Superior Court of the said State, at Wilmington.

In testimony whereof, I hereunto set my hand and affix the seal of the said Court, this Sixteenth day of February A. D. One thousand nine hundred and forty.

MARTIN G. HANNIGAN,
(Seal) Prothonotary.

State of Delaware, to-wit:—

I, Daniel J. Layton, Chief Justice of the State of Delaware, and as such, the Presiding Judge of the Superior Court of the said State, do hereby certify that the foregoing Record and attestation, made by Martin G. Hannigan, Esq., Prothonotary of the said Court within the County of New Castle, whose name is thereto subscribed, and to which the seal of said Court is affixed, are in due form, and made by the proper officer.

In testimony whereof, I hereunto set my hand, this Sixteenth day of February A. D. One thousand Nine hundred and forty.

DANIEL J. LAYTON,
Chief Justice.

[fol. 468] State of Delaware,
New Castle County—ss.:

I, Martin G. Hannigan, Prothonotary of the Superior Court of the State of Delaware, in and for the County of New Castle, do certify that the Honorable Daniel J. Layton, Esquire, by whom the foregoing attestation was made, and whose name is thereto subscribed, was at the time of making thereof, and still is, Chief Justice of the State of Delaware, and, as such, the Presiding Judge of the Superior Court of the said State, duly commissioned and sworn, to all whose acts, as such, full faith and credit are, and ought to be, given, as well in Courts of Justice as elsewhere.

In testimony whereof, I hereunto set my hand and affix the seal of the said Court, this Sixteenth day of February A. D. One thousand nine hundred and forty.

MARTIN G. HANNIGAN,
(Seal) Prothonotary.

Filed in the District Court March 20, 1940.

[fol. 469] (Exhibit S. C.-6)

Certificate of County Recorder of Allamakee County, State of Iowa.

3462

State of Iowa,
Allamakee County—ss.:

Office of County Recorder, Waukon, Iowa, Sept. 27th., 1939

I, Emmett C. Sullivan, County Recorder of Allamakee County, State of Iowa, do hereby Certify, that the foregoing Copy of Mortgage is a full, true and correct copy of

625

such Mortgage as it appears of record on page 626 of book L of the Town Lot records in my custody in the office of the County Recorder of Allamakee County, State of Iowa.

EMMETT C. SULLIVAN,
(Seal) County Recorder of Allamakee County, State of Iowa.

[fol. 470] Mortgage By And Between
Iowa-Wisconsin Bridge Company
To
Phoenix Finance System, Inc.

Know All Men By These Presents: That the Iowa-Wisconsin Bridge Company, a Delaware corporation, hereinafter sometimes called the "Mortgagor", in consideration of the sum of Fifty Thousand Dollars ($50,000.00) in hand paid by the Phoenix Finance System, Inc., a Delaware corporation, hereinafter sometimes called the "Mortgagee", does hereby sell and convey unto the said Phoenix Finance System, Inc., the following described premises and property situated in the County of Allamakee, State of Iowa, and in Crawford County, Wisconsin, to-wit:

"West Forty (40) feet of Bellou Street in the City of Lansing, Iowa, as vacated by the City Council of said City of Lansing, Iowa, on October 21, 1930.

"Lots One (1) and Two (2), Block Eight (8), City of Lansing, Iowa.

"Lots One (1) and Two (2), Block Nine (9), City of Lansing, Iowa.

"That part of Lots Three (3) and Five (5) and the Northeast Quarter of Southeast Quarter (NE¼ SE¼) and Southeast Quarter of Northeast Quarter (SE¼ NE¼) of Section Four (4), Township Ten (10), Range Seven (7), and that part of Lots One (1), Seven (7), and Eight (8), in Section Three (3), Township Ten (10), Range Seven (7), and that part of the Southeast Quarter (SE¼) of Section Thirty-four (34), Township Eleven (11), Range Seven (7), and that part of Section Thirty-five (35), Township Eleven (11), Range Seven (7), all in Crawford County, State of Wisconsin, which lies one hundred (100) feet on each side of the center line of a roadway; said center line is described as follows:

"Beginning at a point on the easterly bank of the Mississippi River distant seven hundred (700) feet northwest-[fol. 471] erly from the point of intersection of the south line of Section Four (4), Township Ten (10), Range Seven (7), with the easterly bank of the Mississippi River, thence north sixty-three degrees (63°) east magnetic bearing, sixteen hundred and fifty (1650) feet, thence north fifty-one degrees (51°) east magnetic, twenty-eight hundred (2800) feet, thence north thirty-eight degrees (38°) east magnetic, thirty-two hundred (3200) feet to Station Ninety (90), which is a point eleven hundred and seventeen (1117) feet west of the southeast corner of Section Thirty-four (34), Township Eleven (11), Range Seven (7), thence north thirty-eight degrees (38°) east magnetic, thirty-three hundred (3300) feet, thence north twenty-three degrees (23°) east magnetic, fourteen hundred and seventy-eight (1478) feet, thence north fifty-seven degrees (57°) east magnetic, one thousand (1000) feet, to the westerly banl of the Winneshiek slough."

together with any and all other real property hereafter acquired by the Iowa-Wisconsin Bridge Company in either Crawford County, Wisconsin, or Allamakee County, Iowa, and together with the toll bridge and other structures, buildings and improvements erected upon said premises, or to be erected thereon, and all appurtenances thereto; all rights of way and easements; all franchises and rights in connection therewith; and all personal property which the Mortgagor now owns or may hereafter acquire, which

said personal property is now or may become a part of the so-called toll bridge of the Mortgagor;

And the said Iowa-Wisconsin Bridge Company hereby covenants with the said Phoenix Finance System, Inc., that it holds said premises by title in fee simple and has good right and lawful authority to sell and convey the same; that said premises are free and clear of all liens and encumbrances whatsoever save and except a certain lease [fol. 472] agreement made between the Mortgagor and John W. Shaffer, dated December 2, 1930; and the said Iowa-Wisconsin Bridge Company covenants and warrants to defend the said premises against the lawful claims of all persons whomsoever.

Provided, always, and these presents are made upon this express condition, that if the said Iowa-Wisconsin Bridge Company, its successors and assigns, shall pay, or cause to be paid, to the said Phoenix Finance System, Inc., its successors or assigns, the sum of Fifty Thousand Dollars ($50,000.00) on or before the 10th day of September, 1931, with interest thereon at the rate of eight per cent per annum, according to the tenor and effect of a promissory note of said Iowa-Wisconsin Bridge Company in said amount, payable to the said Phoenix Finance System, Inc., bearing date March 10th, 1931, then these presents to be void, otherwise to remain in full force.

And the said Iowa-Wisconsin Bridge Company further agrees that the said Phoenix Finance System, Inc., at any time during the existence of this indebtedness, or any part thereof, and until the same is fully paid, shall have full power, and is hereby authorized as attorney-in-fact for said Iowa-Wisconsin Bridge Company, to pay all liens of any kind, whether prior or subsequent, that may in any manner affect the title to the lands, buildings, structures, toll bridge and appurtenances herein and hereby conveyed, and for the repayment of all moneys so paid, together with interest thereon at the rate of eight per cent per annum, payable semi-annually, this indenture shall be like security, in like manner, and with like effect as for the payment of said note.

[fol. 473] And it is hereby further agreed that in case it becomes necessary to commence proceedings to foreclose

this mortgage, then the said Iowa-Wisconsin Bridge Company, in addition to the amount of said debt, interest and costs, agrees to pay to the Mortgagee herein named, or the assignee of the Mortgagee herein, a reasonable attorney's fee for collecting the same, which fee shall be included in the judgment in such foreclosure sale.

In Testimony Whereof, the said Mortgagor has caused these presents to be executed in its corporate name by its Vice-President and its Treasurer, and its corporate seal to be hereunto affixed this 10th day of March, 1931.

IOWA-WISCONSIN BRIDGE COMPANY,
By A. B. Wilder,
Its Vice President, and
By Oscar R. Thorson,
Its Treasurer.

In the Presence of
M. White,
Raymond E. Henneman.

(Seal)

State of Minnesota,
County of Hennepin—ss.

On this 10th day of March, 1931, before me, a notary public within and for said County, personally appeared A. B. Wilder and Oscar R. Thorson, to me personally known, who, being each by me duly sworn did say that they are respectively the Vice President and Treasurer of the Iowa-Wisconsin Bridge Company, the corporation named in the foregoing instrument, and that the seal affixed to said instrument is the corporate seal of said corporation, and that [fol. 474] said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said A. B. Wilder and Oscar R. Thorson acknowledged said instrument to be the free act and deed of said corporation.

M. R. JOHNSTONE,
(Seal) Notary Public.

My Commission Expires August 31, 1935.

The undersigned, The Standard Shares Holding Company, a corporation organized under the laws of the State

of Minnesota, does hereby approve of and consent to the foregoing mortgage executed by and between the Iowa-Wisconsin Bridge Company, Mortgagor, and Phoenix Finance System, Inc., Mortgagee, in the sum of $50,000.00, which said mortgage bears date the 10th day of March, 1931.

Signed this 28th day of April, 1931.

THE STANDARD SHARES
HOLDING COMPANY,
By John W. Shaffer,
Its President and
(Seal) By M. E. Lockhart, Its Secretary.

The undersigned, John W. Shaffer, does hereby approve of and consent to the foregoing mortgage executed by and between Iowa-Wisconsin Bridge Company, Mortgagor, and Phoenix Finance System, Inc., Mortgagee, in the sum of $50,000.00, bearing date the 10th day of March, 1931; it being specifically understood that the undersigned does not hereby intend to, nor does he, prejudice any right and interest which he has in and to the premises described in said mortgage arising by reason of that certain lease agreement made and signed the 2nd day of December, 1930, between Iowa-Wisconsin Bridge Company as Lessor and the undersigned as Lessee.

Signed this 28th day of April, 1931.

JOHN W. SHAFFER.

[fol. 475] No. 2149

Iowa-Wisconsin Bridge Company
To
Phoenix Finance System, Inc.

State of Iowa,
Allamakee County—ss.

Filed for record the 2nd. day of June, A. D. 1939, at 8:10 o'clock A. M.

EMMETT C. SULLIVAN,
Recorder.

Recorded in Book "L" Pages 625-626 of Town Lot Mortgages.

Filed in the District Court March 20, 1940.

[fol. 476] (Exhibit S. C.-7.)

No. 114805

Mortgage

Know All Men By These Presents: That the Iowa-Wisconsin Bridge Company, a Delaware corporation, hereinafter sometimes called the "Mortgagor", in consideration of the sum of Fifty Thousand Dollars ($50,000.00) in hand paid by the Phoenix Finance System, Inc., a Delaware corporation, hereinafter sometimes called the "Mortgagee", does hereby sell and convey unto the said Phoenix Finance System, Inc., the following described premises and property situated in the County of Allamakee, State of Iowa, and in Crawford County, Wisconsin, to-wit:

"West Forty (40) Feet of Bellou Street in the City of Lansing, Iowa, as vacated by the City Council of said City of Lansing, Iowa, on October 21, 1929.

"Lots One (1) and Two (2), Block Eight (8), City of Lansing, Iowa.

"Lots One (1) and Two (2), Block Nine (9), City of Lansing, Iowa.

"That part of Lots Three (3) and Five (5) and the Northeast Quarter of Southeast Quarter (NE¼SE¼) and Southeast Quarter of Northeast Quarter (SE¼ NE¼) of Section Four (4), Township Ten (10), Range Seven (7), and that part of Lots One (1), Seven (7), and Eight (8), in Section Three (3), Township Ten (10), Range Seven (7), and that part of the Southeast Quarter (SE¼) of Section Thirty-four (34), Township Eleven (11), Range Seven (7), and that part of Section Thirty-five (35), Township Eleven (11), Range Seven (7), all in Crawford County, State of Wisconsin, which lies one hundred (100) feet on each side of the center line of a roadway; said center line is described as follows:

"Beginning at a point on the easterly bank of the Mississippi River distant seven hundred (700) feet northwesterly from the point of intersection of the south line of Sec-
[fol. 477] tion Four (4), Township Ten (10), Range Seven (7), with the easterly bank of the Mississippi River, thence north sixty-three degrees (63°) east magnetic bearing,

sixteen hundred and fifty (1650) feet, thence north fifty-one degrees (51°) east magnetic, twenty-eight hundred (2800) feet, thence north thirty-eight degrees (38°) east magnetic, thirty-two hundred (3200) feet to Station Ninety, (90), which is a point eleven hundred and seventeen (1117) feet west of the southeast corner of Section Thirty-four (34), Township Eleven (11), Range Seven (7), thence north thirty-eight degrees (38°) east magnetic, thirty-three hundred (3300) feet, thence north twenty-three degrees (23°) east magnetic, fourteen hundred and seventy-eight (1478) feet, thence north fifty-seven degrees (57°) east magnetic, one thousand (1000) feet, to the westerly bank of the Winneshiek slough."

together with any and all other real property hereafter acquired by the Iowa-Wisconsin Bridge Company in either Crawford County, Wisconsin, or Allamakee County, Iowa, and together with the toll bridge and other structures, buildings and improvements erected upon said premises, or to be erected thereon, and all appurtenances thereto; all rights of way and easements; all franchises and rights in connection therewith; and all personal property which the Mortgagor now owns or may hereafter acquire, which said personal property is now or may become a part of the so called toll bridge of the Mortgagor;

And the said Iowa-Wisconsin Bridge Company hereby covenants with the said Phoenix Finance System, Inc., that it holds said premises by title in fee simple and has good right and lawful authority to sell and convey the same; that said premises are free and clear of all liens and encumbrances whatsoever save and except a certain lease agreement made between the Mortgagor and John W. Shaffer dated December 2, 1930; And the said Iowa-Wisconsin Bridge Company covenants and warrants to defend the said premises against the lawful claims of all persons whomsoever.

Provided, always, and these presents are made upon this express condition, that if the said Iowa-Wisconsin Bridge Company, its successors and assigns, shall pay, or cause to be paid, to the said Phoenix Finance System, Inc., its successors or assigns, the sum of Fifty Thousand Dollars ($50,000) on or before the 10th day of September, 1931,

with interest thereon at the rate of eight per cent per annum, according to the tenor and effect of a promissory note of said Iowa-Wisconsin Bridge Company in said amount, payable to the said Phoenix Finance System, Inc., [fol. 478] bearing date March 10th, 1931, then these presents to be void, otherwise to remain in full force.

And the said Iowa-Wisconsin Bridge Company further agrees that the said Phoenix Finance System, Inc., at any time during the existence of this indebtedness, or any part thereof, and until the same is fully paid, shall have full power, and is hereby authorized as attorney-in-fact for said Iowa-Wisconsin Bridge Company, to pay all liens of any kind, whether prior or subsequent, that may in any manner affect the title to the lands, buildings, structures, toll bridge and appurtenances herein and hereby conveyed, and for the repayment of all moneys so paid, together with interest thereon at the rate of eight per cent per annum, payable semi-annually, this indenture shall be like security, in like manner, and with like effect as for the payment of said note.

And it is hereby further agreed that in case it becomes necessary to commence proceedings to foreclose this mortgage, then the said Iowa-Wisconsin Bridge Company, in addition to the amount of said debt, interest and costs, agrees to pay to the Mortgagee herein named, or the assignee of the Mortgagee herein, a reasonable attorney's fee for collecting the same, which fee shall be included in the judgment in such foreclosure sale.

In Testimony Whereof, the said Mortgagor has caused these presents to be executed in its corporate name by its Vice President and its Treasurer, and its corporate seal to be hereunto affixed this 10th day of March 1931.

IOWA-WISCONSIN BRIDGE COMPANY,
By A. B. Wilder,
Its Vice President.
And By Oscar R. Thorson,
Its Treasurer.

In The Presence Of
M. White
Raymond E. Hermeman

Iowa-Wisconsin Bridge
Co.

Seal

Delaware

[fol. 479] State of Minnesota,
County of Hennepin—ss.:

On this 10th day of March, 1931, before me, a notary public within and for said County, personally appeared A. B. Wilder and Oscar R. Thorson, to me personally known, who, being each by me duly sworn did say that they are respectively the Vice President and Treasurer of the Iowa-Wisconsin Bridge Company, the corporation named in th .oregoing instrument, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said A. B. Wilder and Oscar R. Thorson acknowledged said instrument to be the free act and deed of said corporation.

Notarial Seal
Hennepin Co., Minn.

M. R. JOHNSTONE,
Notary Public.

My Commission expires August 31, 1935.

The undersigned, The Standard Shares Holding Company, a corporation organized under the laws of the State of Minnesota, does hereby approve of and consent to the foregoing mortgage executed by and between the Iowa-Wisconsin Bridge Company, Mortgagor, and Phoenix Finance System, Inc., Mortgagee, in the sum of $50,000.00, which said mortgage bears date the 10th day of March, 1931.

Signed this 28th day of April, 1931.

THE STANDARD SHARES
HOLDING COMPANY,

By John W. Shaffer
Its President.

And By M. C. Lockhart,
Its Secretary.

Standard Shares Holding
Company
Minnesota

[fol. 480] The undersigned, John W. Shaffer, does hereby approve of and consent to the foregoing mortgage executed by and between Iowa-Wisconsin Bridge Company, Mortgagor, and Phoenix Finance System, Inc., Mortgagee, in the sum of $50,000.00, bearing date the 10th day of March 1931; it being specifically understood that the undersigned does not hereby intend to, nor does he, prejudice any right and interest which he has in and to the premises described in said mortgage arising by reason of that certain lease agreement made and signed the 2nd day of December, 1930, between Iowa-Wisconsin Bridge Company as Lessor and the undersigned as Lessee.

Signed this 25th day of April, 1931.

JOHN W. SHAFFER.

Received for Record this 18 day of May A. D. 1939 at 8:30 o' clock A. M.

MARGUERITE ROGERS,
Register of Deeds.

State of Wisconsin,
Crawford County—ss.:

I, Marguerite Rogers, Register of Deeds in and for said County and State, do hereby certify that I have compared the foregoing and hereunto annexed copy with original Certified copy of Mortgage-Iowa-Wisconsin Bridge Co. to Phoenix Finance System, Inc. Vol. 153, page 293 that it is a correct transcript therefrom and of the whole thereof as the same remains of record in my office.

In Testimony Whereof, I have hereunto set my hand and Seal at Prairie du Chien, this 4th day of March, A. D. 1940.

MARGUERITE ROGERS,
(Seal) Register of Deeds.

[fol. 481] State of Wisconsin, to-wit:

I, S. E. Smalley, Circuit Judge of the Fifth Circuit of the State of Wisconsin, and as such, the presiding Judge

of the Circuit Court of Wisconsin in and for Crawford County, do hereby certify that the foregoing record and attestation made by Marguerite Rogers, Registrar of Deeds within the County of Crawford, whose name is thereto subscribed, are in due form, and made by the proper officer. And I further certify that Hubert C. Freeman is the Clerk of the Circuit Court of Wisconsin, Fifth Circuit, in and for Crawford County.

In testimony whereof, I have hereunto set my hand this 9th day of March, 1940.

S. E. SMALLEY,
Judge.

State of Wisconsin,
Crawford County—ss.:

I, Hubert C. Freeman, Clerk of the Circuit Court of the State of Wisconsin, Fifth Circuit, in and for Crawford County, do hereby certify that Hon. S. E. Smalley, by whom the foregoing attestation was made, and whose name is thereto subscribed, was at the time of making thereof, and still is Circuit Judge of the State of Wisconsin, Fifth Circuit, and, as such, the presiding Judge of the Circuit Court of said State in and for Crawford County, duly commissioned, qualified and sworn, to all whose acts, as such, full faith and credit are, and ought to be, given, as well in the Courts of justice as elsewhere.

In testimony whereof, I hereto set my hand and affix the seal of said Court this 9th day of March A. D. 1940.

HUBERT C. FREEMAN,
(Seal) Clerk Circuit Court of Wisconsin in and for Crawford County.

[fol. 482] State of Wisconsin,
County of Crawford—ss.:

I, Lester R. Daugherty, County Clerk of Crawford County, do hereby certify that Marguerite Rogers is the duly elected and qualified Register of Deeds in and for Crawford County, Wisconsin.

Given under my hand and official seal at the Court House in the city of Prairie du Chien this 9th day of March, 1940.

LESTER R. DAUGHERTY,
(Seal) County Clerk.

Filed in the District Court March 20, 1940.

[fol. 483] (Exhibit SC-101)

State of Delaware,
New Castle County—ss.:

I, Martin G. Hannigan, Prothonotary of the Superior Court of the State of Delaware, in and for New Castle County, do hereby certify that the foregoing pages contain a true copy of the whol Record and Proceedings in the case there stated as the same now remains in the Superior Court of the said State, at Wilmington.

In testimony whereof, I hereunto set my hand and affix the seal of the said Court, this Seventh day of March, A. D., One thousand nine hundred and forty.

MARTIN G. HANNIGAN,
(Seal) Prothonotary.

State of Delaware, to-wit:—

I, Daniel J. Layton, Chief Justice of the State of Delaware, and as such, the Presiding Judge of the Superior County of the said State, do hereby certify that the foregoing Record and attestation, made by Martin G. Hannigan, Esq., Prothonotary of the said Court, within the County of New Castle, whose name is thereto subscribed, and to which the seal of said Court is affixed, are in due form and made by the proper officer.

In testimony whereof I hereunto set my hand this Seventh day of March, A. D., One thousand nine hundred and forty.

Chief Justice.

State of Delaware,
New Castle County—ss.:

I, Martin G. Hannigan, Prothonotary of the Superior Court of the State of Delaware, in and for the County of New Castle, do certify that the Honorable Daniel J. Layton, Esquire, by whom the foregoing attestation was made, and whose name is thereto subscribed, was at the time of making thereof, and still is, Chief Justice of the State of Delaware, and, as such, the Presiding Judge of the Superior Court of the said State, duly commissioned and [fol. 484] sworn, to all whose acts, as such, full faith and credit are, and ought to be, given, as well in Courts of Justice as elsewhere.

In testimony whereof, I hereunto set my hand and affix the seal of the said Court, this Seventh day of March, A. D. One thousand and nine hundred and forty.

MARTIN G. HANNIGAN,
(Seal) Prothonotary.

[fol. 485] (Request for Issuance of Summons.)

In the Superior Court of the State of Delaware in and for New Castle County.

Summons Case.

November Term, A. D. 1938.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 39. vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

Please issue Summons Case to the November Term, A. D., 1938.

ARTHUR G. LOGAN,
MARVEL, MORFORD & LOGAN,
Attorneys for Plaintiff.

To Martin G. Hannigan, Esquire, Prothonotary.

Filed Sept. 28, 2:40 P. M. '38 Martin G. Hannigan, Prothonotary.

[fol. 486] (Summons and Sheriff's Return.)

Sum Case

New Castle County—ss.

The State of Delaware,

To the Sheriff of New Castle County—Greeting:

(Seal)

We Command You That you summon Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware late of your County Company so that it be and appear before the Judges of our Superior Court at Wilmington, on Monday, the Seventh day of November next to answer Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware of a plea of trespass on the case, etc.

And have you then there this Writ.

Witness, the Honorable Daniel J. Layton, at Wilmington, the Nineteenth day of September, in the year of our Lord one thousand nine hundred and thirty-eight.

Issued Sep. 29, 1938.

MARTIN G. HANNIGAN,
Pronothary.

[fol. 487] #2-311 Superior

No. 39 Nov. Term, A. D., 1938

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

Sum Case

MM&L, Esqs. Pro.q

Summoned Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the

State of Delaware by serving personally and delivering a copy of the within writ to Charles Peabbles, Assistant Secretary of Corporation Trust Company resident agent of said Iowa-Wisconsin Bridge Company, a corporation as aforesaid September 30, 1938.

So Ans.

JOHN M. ULMER,
Sheriff.

Costs & .75
Mlg. .10
—
.85

[fol. 488] In the Superior Court of the State of Delaware in and for New Castle County.

Summons Case

November Term, A. D. 1938

M. M. & L. Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

39 vs.

W. & G. Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

Oct. 31, 1938. Affidavit of Demand filed with copy.

Nov. 7, 1938. Ward & Gray enter appearance for deft.

Nov. 10, 1938. By agreement of counsel, time for filing affidavit of defense extended to Nov. 17, 1938.

Nov. 15, 1938. Affidavit of Defense filed with copy.

Dec. 14, 1938. Narr Filed with copy. Rule pleas by first general Rule day in January.

[fol. 489] (Affidavit of Demand.)

In the Superior Court of the State of Delaware in and for New Castle County

Summons Case

November Term, A. D. 1938.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 39. vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

State of Florida,
County of Pinellas—ss.:

Before Me, Josie Lee Bates, A notary Public of the State of Florida for the County aforesaid, personally comes M. K. Thompson, Treasurer of Phoenix Finance Corporation, the plaintiff above named, who, being by me duly sworn according to law deposes and says that she is the treasurer of the plaintiff, Phoenix Finance Corporation, that annexed hereto are true and correct copies of the promissory notes sued upon in this action, that the sum demanded of the said defendant is the sum of $5,125 with lawful interest on the sum of $2,000, being the amount due on one of said promissory notes, from the 15th day of December, 1932, and with lawful interest on the sum of $3,125, being the amount due on the other of said promissory notes, from the 20th day of January, A. D. 1933, and said deponent further says that she verily believes that the same [fol. 490] is justly and truly due from the said defendant to the said plaintiff.

M. K. THOMPSON.

Sworn to and subscribed before me this 26th day of October, A. D. 1938.

JOSIE LEE BATES,
Notary Public, State of Florida at Large.

My commission expires October 4, 1939.

[fol 491] $3,125.00 Des Moines, Iowa, Jan. 20, 1933....

On the 20 day of July 1933 for value received We promise to pay to the order of Phoenix Finance Corporation the sum of Thirty-one hundred twenty five and no/100 Dollars Payable at 316 12th Street, Des Moines, Iowa. with interest at 8 per cent per annum from date. Interest payable semi-annually.

Upon default of payment of this note, the makers, endorsers, guarantors, and sureties, agree to pay all attorneys' fees and expenses of collection, and consent that any justice of the peace may have jurisdiction on this note to the amount of $300.00 and ..... do hereby severally waive demand of payment, protest, and notice of protest of this note and consent that time of payment may be extended without notice. A failure to pay interest when due, shall cause this note to become due.

IOWA-WISCONSIN BRIDGE COMPANY,
By Oscar R. Thorson, Secy-Treas.

P. O. Address .....

No. .....

[fol. 492] $**2,000.00**

Des Moines, Iowa, December 15, 1932.

On the 15 day of June, 1933 XXXXXXX for value received We promise to pay to the order of Phoenix Finance Corporation the sum of Two Thousand and No/100 Dollars Payable at 316 12th Street, Des Moines, Iowa with interest at 8 per cent. per annum from date. Interest payable semi-annually.

Upon default of payment of this note, the makers, endorsers, guarantors, and sureties, agree to pay all attorneys' fees and expenses of collection and consent that any justice of the peace may have jurisdiction on this note to the amount of $300.00 and we do hereby severally waive demand of payment, protest, and notice of protest of this note and consent that time of payment may be extended

without notice. A failure to pay interest when due, shall cause this note to become due.

IOWA-WISCONSIN BRIDGE
COMPANY,
By Oscar R. Thorson,
Secretary-Treasurer.

P. O. Address .....

No. .....

[fol. 493] (Affidavit of Defense.)

In the Superior Court of the State of Delaware in and for New Castle County.

Summons Case.

November Term A. D. 1938.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 39. vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

State of Iowa,
Cerro Gordo County—ss.

Be It Remembered That on this 9th day of November A. D. 1938, before me, F. T. Barrett, a Notary Public of the State of Iowa, in and for Cerro Gordo County, personally comes Irene M. Bell, Secretary and Treasurer of the Iowa-Wisconsin Bridge Compayny, the defendant above named, who being by me duly qualified according to law, deposes and says that she is the Secretary and Treasurer of the Iowa-Wisconsin Bridge Company, defendant in the above named suit, and that she verily believes that there is a legal defense to the whole of the cause of action in said suit, the nature and character of which defense is fraud, want of consideration, former adjudication, want of lawful authorized execution and delivery, and offset.

That John A. Thompson was president of and interested in and with his wife, M. K. Thompson and associates A. B. Wilder and Emery H. English, controlled the Phoenix Finance System Incorporated and other affiliated companies.

That M. White was John A. Thompson's secretary and an officer of the Pheonix Finance System Incorporated.

[fol. 494] That Thompson & Company was a wholly owned subsidiary of the Phoenix Finance System Incorporated and was but an agency adjunct and instrumentality of the Phoenix Finance System, Inc. and used as such.

That in October and November 1930 through negotiations with John W. Shaffer and Vernon W. O'Connor, John A. Thompson became President of and acquired control of the Iowa-Wisconsin Bridge Company (hereinafter called the Bridge Company). At about the same time the number of directors of the Bridge Company was increased and Thompson together with other directors of the Phoenix Finance System, Inc. became directors of the Bridge Company. From that time on, Thompson controlled the Bridge Company.

On November 26, 1930, a stated settlement as of October 31, 1930, was made between the Standard Shares Holding Company and the Bridge Company, under which there were delivered to the Bridge Company by its trustees, liquid assets, such as cash, bills and accounts receivable, stocks and bonds, inventoried at $90,235.68; construction accounts representing amounts which had been paid for construction to date aggregating $183,496.90, and equipment, etc., amounting to $1,986., and commission and organization and expense accounts amounting to $75,231.08, making a total of $350,950., and there had been sold by said trustee for the account of the Bridge Company stock of the latter at $100. per share, amounting to $350,950. The settlement also provided for the return of all stock of the Bridge Company held by said trustee except 1500 shares of Class B stock, which were returned to the Bridge Company in consideration of a so-called management contract, the terms of which are immaterial in this litigation. On the $90,935. of liquid assets there was later realized over $79,000. in cash [fol. 495] and the Bridge Company had treasury stock in the amount of $390,050. to build its superstructure and com-

plete its bridge. The substructure was practically complete and the sub-contractor thereof had been paid within $8200. of the total cost and the grading was well under way.

Under date of November 11, 1930, a contract for the completion of the bridge was entered into between the Bridge Company, acting through John A. Thompson as president and John W. Shaffer & Company, which included erection of super-structure of the bridge, erection of piles and trestles over certain sloughs, erection of toll house, etc., and surfacing of roadway and whereby the Bridge Company agreed to and did pay $10,000. in cash and agreed to and did deliver 3200 shares of its capital stock at a fixed price of $320,000., to John W. Shaffer & Company, and Shaffer & Company in said contract agreed to furnish a surety bond to insure the obligations of said Shaffer & Company. Extras were required to be ordered in writing. John W. Shaffer & Company sublet the contract for steel to McClintic-Marshall Company and the construction work to the Industrial Contracting Company.

In November, 1930, immediately after the issuance of said 3200 shares of stock to Shaffer & Company, the latter company sold said stock to Thompson & Company and received the promissory note of Thompson & Company for $224,000. therefor,

That about the first of November, 1930, 140 shares of Bridge Company stock were issued to Phoenix Finance System, Inc., and the value thereof fixed at $100. per share, to-wit: $14,000. That upon the issuance of such stock Phoenix Finance System, Inc., became indebted to the Bridge Company for said amount. That such amount has not been paid. That the Phoenix Finance System, Inc., disposed of such stock to the public. That thereafter John A. Thompson, then president of the Bridge Company, dom-[fol. 496] inating and controlling the Bridge Company, and his associates caused the execution of a purported guaranty contract providing for the turning over to the Phoenix Finance System, Inc., such stock without payment therefor. That in such transaction John A. Thompson acted in a dual capacity as president of the Bridge Company and as president of the Phoenix Finance System, Inc., and acted in the interests of himself and his affiliated companies as against

the interests of the Bridge Company and dealt with himself in such transaction. That the Bridge Company has not received consideration for the aforesaid stock and there is due the Bridge Company on account thereof the sum of $14,000. with interest.

That John A. Thompson on November 5, 1930, purchased 65 shares of Bridge Company stock from the Bridge Company at $100. per share, and on the same day A. B. Wilder, also a director of the Bridge Company, purchased 10 shares of Bridge Company stock from the Bridge Company at $100. per share. That on the 31st day of December, 1930, Thompson & Company purchased 170 shares of Bridge Company stock from the Bridge Company at $100. per share. That subsequent to such purchase of stock by John A. Thompson and A. B. Wilder on the 31st day of December, 1930, the said John A. Thompson, through his dominant control of the Bridge Company, credited to Thompson & Company on the books of the Bridge Company 15% commission on all of the aforesaid stock in the sum of $3,675. That it was the duty of John A. Thompson and A. B. Wilder as directors of the Bridge Company to assist in selling stock owned by the Bridge Company. That in the selling of said stock no exceptional or extraordinary services were rendered and they were not entitled to credit for said commissions.

[fol. 497] A stockholders' meeting of the Bridge Company was held March 10, 1931, which was controlled by the stock of Thompson & Company and John A. Thompson, 1310 shares and proxies held by Thompson 375 shares, a total of 1685 shares out of 2586 shares represented, at which meeting a board of directors was elected controlled by said Thompson. Following said stockholders' meeting, a directors' meeting was held attended by only Thompson directors, viz., V. W. O'Connor, John A. Thompson, A. B. Wilder and Oscar R. Thorson. At this meeting, there was passed a purported resolution providing for the issuance of a $50,000. mortgage to the Phoenix Finance System, Inc., on the properties of the Iowa-Wisconsin Bridge Company which resolution contained the false and fraudulent recital that funds received from sale of stock had been inadequate to properly finance the rapid completion of the bridge; whereas, the Bridge Company then had nothing to

do with the sale of stock and it had delivered to J. W. Shaffer & Company $320,000. of its stock and $10,000. in cash for the completion of the bridge. That pursuant to such resolution a mortgage was executed to Phoenix Finance System, Inc., for $50,000. signed on behalf of the Bridge Company by A. B. Wilder, who was then also an officer and director of said mortgage company. That in truth and in fact no indebtedness of said Bridge Company to the Phoenix Finance System, Inc., existed and the Bridge Company received no consideration for the execution of said mortgage; that the same was and is wholly without consideration, fraudulent and void. At said time said Thompson caused entries to be made on the books of said Bridge Company purporting to show the receipt of $50,000. in cash, whereas, in truth and in fact, said amount and no part thereof was received by the Bridge Company.

[fol. 498] That about the 11th day of March, 1931, John A. Thompson and his affiliated companies, through the dominant control of the Iowa-Wisconsin Bridge Company, caused a payment of $3,000. to be made from the funds of the Bridge Company to A. B. Wilder through the medium of checks issued to John W. Shaffer and immediately endorsed and delivered to A. B. Wilder, and $1000. thereof was then turned over to Thompson & Company by said Wilder. That the said Wilder was then an officer and director of the Phoenix Finance System, Inc., and also a director of the Bridge Company. That no resolution was passed by the stockholders or directors of the Bridge Company authorizing such payments to said Wilder nor was there any action taken or resolution passed by the Bridge Company providing for the payment of any amount to said Wilder for services nor had there been nor were there any exceptional or extraordinary services rendered by said Wilder to the Bridge Company. That no consideration passed to the Bridge Company for such sums. That the said Thompson and his affiliated companies controlling the Bridge Company, so manipulated its books as to cause fictitious entries to be made thereon as though said sums were paid on approaches, when in fact no work was done on approaches for which said sums or any part thereof was a proper payment. That payment of said amounts was a misappropriation of the Bridge Company's funds.

That on the 1st day of November, 1931, John A. Thompson and his affiliated companies through the exercise of dominant control of the Bridge Company turned over to the Bridge Company $5,410.85 of notes taken by Thompson & Company in the sales of Bridge Company stock owned by Thompson & Company and with which Thompson & Company held as collateral such stock sold by it. That said Thompson & Company took or received from the Bridge [fol. 499] Company $5,410.85 for such notes. That in such transaction John A. Thompson acted in a dual capacity as president of the Bridge Company and as president of the Phoenix Finance System, Inc., and controlling its subsidiary Thompson & Company and acted in the interests of himself and his affiliated companies against the interests of the Bridge Company and dealt with himself in such transaction. The Bridge Company at the time of such transaction did not have any surplus from which it could purchase any of its stock.

That notwithstanding the alleged mortgage Thompson & Company continued to sell its bridge stock through its agents at $100. per share, on the representation that the Bridge Company had no funded debt, and concealed the fact of the existence of said mortgage from stockholders and directors of the Bridge Company.

That on August 6, 1931, John W. Shaffer & Company owed Industrial Contracting Company $10,000.; McClintic-Marshall Company $11,262.71 and to Kramer & Hogg an amount, then in dispute; Shaffer & Company also claimed to be entitled to payment for certain extra steel; certain extra labor and material, and commissions. There were also other matters in dispute between the Bridge Company and Shaffer & Company with reference to the bridge contracts. To make a complete settlement, a stated settlement contract was made August 6, 1931 between the Bridge Company as party of the first part, and John W. Shaffer, V. W. O'Connor, John W. Shaffer & Co., and Standard Shares Holding Company, as parties of the second part, which was executed on behalf of the Bridge Company, by J. A. Thompson as president and which provided;

(a) That the Bridge Company transfer to the other parties to the contract 120 shares of its common stock and

80 shares of its preferred stock and certain other securities which were of the value of $2,475., and pay to Kramer & [fol. 500] Hogg the balance due them.

(b) That the second parties (Shaffer, O'Connor, Standard Shares Holding Company and Shaffer & Company) accept such consideration "as full and complete settlement of all sums due them and/or any of them and for full satisfaction and stated settlement of any and all claims of all kinds whatsoever arising out of any contract or other relations between the parties hereto and/or pertaining in any way to said toll bridge and second parties separately and jointly hereby release said Iowa-Wisconsin Bridge Company fully and completely. Second parties hereby specifically acknowledge receipt of full payment for all engineering, designing and building of said bridge, and for all material, services and all other things pertaining to said bridge."

The Bridge Company pursuant to this contract delivered 200 shares of its stock of the value of $20,000. and other securities of the value of $2,475.

That at about the same time John W. Shaffer agreed to and did turn over to Thompson of Thompson & Company, and president of the Phoenix Finance System, Inc., $10,000, of the Bridge Company stock (100 shares received by Shaffer) and Thompson & Company agreed to pay $10,000 owing to the Industrial Contracting Company and $11,262.71 owing to the McClintic-Marshall Co. Neither the Industrial Contracting Company nor the McClintic-Marshall Company had any contract with the Bridge Company, nor was the Bridge Company indebted to them in any amount.

On September 24, 1931, the Industrial Contracting Company drew a sight draft on Phoenix Finance System, Inc., for the balance of $10,000 due them which Thompson & Company had agreed to pay and for which the Bridge Company was not liable. As a part of the fraudulent scheme and plan, leading up to the issuance of the bonds [fol. 501] hereinafter mentioned, said John A. Thompson caused entries and deposits and withdrawals on the Bridge Company's records to be made, purporting to show that

Phoenix Finance System, Inc., had advanced to the Bridge Company the sum of $10,000, and that the Bridge Company had made payment on said sight draft, and pretended thereby to show an indebtedness of $10,000 due from the Bridge Company to Phoenix Finance System., Inc., whereas, in truth and in fact, the said amount was an obligation of Thompson & Company and not of the Bridge Company, and nothing was due from the Bridge Company to Phoenix Finance System, Inc. on account thereof.

That on November 11, 1931, a meeting of the directors of the Bridge Company was held at which a majority present were dominated by John A. Thompson, as president. At this meeting it was represented by John A. Thompson that there was due the Phoenix Finance Corporation $54,000. on the purported mortgage of March 10, 1931, and $10,000. for money advanced Industrial Contracting Company; and that there was other indebtedness including a claim of McClintic-Marshall Company for $12,000. and further obligations aggregating $40,000. That at said meeting resolutions were adopted providing for a bond issue of $200,000.; for a stockholders' meeting to consider the bond issue; for the delivery of bonds to pay the $50,000. mortgage; and for the payment of other alleged claims.

On the same date, a letter prepared at the dictation of John A. Thompson, and signed by Oscar R. Thorson, as secretary-treasurer, of the Bridge Company, under his direction was sent to the stockholders of said Bridge Company. In said letter it was falsely and fraudulently represented to the stockholders of the Bridge Company for the purpose of inducing said stockholders to approve the proposed bond issue of $200,000., and to induce them to [fol. 502] forward proxies to said Thompson and his associates, as follows:

(a) "That in October, 1930, negotiations were opened with Phoenix Finance System, Inc., to lend its aid in arranging for the financing of the completion of the bridge and to save the project from absolute failure.

(b) That there was an understanding that the Phoenix Finance would be repaid by the Bridge Company on demand for any such advances that might be required to be

made by it temporarily in order to fulfill the guarantee and to permit the continuation of work on the bridge.

(c) That sale of stock to the public showing no improvement and in order that the work on the bridge might not be delayed, Phoenix Finance System, Inc., made substantial advances.

(d) That construction of the bridge went forward without delay and the cash required for material and labor was advanced regularly by the Phoenix Finance Company.

(e) That there had been advanced by the Phoenix Finance System, Inc., to the Bridge Company in the payment of bills for labor and material to complete the bridge approximately $70,000., $50,000. of which is secured by a mortgage which was due December 10, 1931.

(f) In addition to the sum of $70,000. which has been advanced by the Phoenix Finance System, Inc., there will be immediately required the further sum of approximately $25,000. to complete payment of outstanding obligations.

(g) The board of directors was confronted with the problem of raising additional funds with which to satisfy the claims of Kramer & Hogg and McClintic-Marshall and Company in order to prevent threatened liens and litigations to collect these amounts.

[fol. 503] (h) There was never intended that this cash advanced by Phoenix Finance System, Inc., to the Bridge Company should be of a permanent nature and it must be repaid.

That the aforesaid representations were misleading, false and fraudulent.

That following the aforesaid letter, notice of a proposed stockholders' meeting for December 22, 1931, with form of proxy running to Emory H. English, Oscar R. Thorson and J. H. Thompson enclosed was sent to Class B voting stockholders and the fraudulent statements contained in the letter of November 11, 1931, were not corrected, nor was any true information given with respect thereto. That said notice called for a special meeting of Class B voting common stock, to consider and authorize directors to borrow, not to exceed $200,000.; to authorize the execution of

mortgage bonds, not to exceed that amount, and to provide the terms and conditions under which such bonds should be issued; to authorize the directors to convey to a named trustee by mortgage deed of trust all of the property and assets of the company to secure the payment of the principal and interest of such bonds; to authorize the directors to sell, pledge or otherwise dispose of such bonds and to apply the proceeds thereof to such corporate purposes as the board might from time to time determine. In response to such letter of Novermber 11, 1931, and said notice of November 20, 1931, the proxies of stockholders were procured reading to Oscar R. Thorson, Emory H. English and J. H. Thompson, Emory R. English and Oscar R. Thorson being the representatives of John A. Thompson and these proxies were voted by Oscar R. Thorson in unison with the stock and proxies held by John A. Thompson, controlled and dominated the stockholders' meeting held on December 22, 1931, as a part of the scheme, plan and conspiracy. At this meeting Oscar R. Thorson voted by [fol. 504] proxy 1011 shares and in person 18 shares and John A. Thompson by proxy 505 shares and in person 137 shares and Mrs. John A. Thompson in person 20 shares, M. White 18 shares. The shares thus voted by Thorson, John A. Thompson, M. K. Thompson and M. White being 1709 shares, which were more than a majority of the 2608 shares represented at the meeting. That at said meeting there was adopted a resolution authorizing the issuance of first mortgage bonds in the aggregate principal sum of $200,000, and the conveyance by mortgage deed of trust of all of the property of the Bridge Company to secure the payment of such bonds. The resolution relating to the bond issue was voted and carried by the votes of said John A. Thompson and his controlled associates Oscar R. Thorson, M. White and his wife M. K. Thompson. Such resolution was presented at said stockholders meeting with false preambles and representations as reasons or excuse for voting of the bond issue as follows:

(a) "Whereas it was originally contemplated that the funds necessary to construct the Blackhawk Bridge would be acquired through the sale of stock and whereas a substantial part of the funds were acquired in that manner, but due to a change in general economic conditions it de-

veloped that it was impossible to realize sufficient funds from that source as rapidly as the same were required to complete the bridge project economically.

(b) "Whereas, it was necessary for the company to borrow funds to expedite the completion of said bridge and avoid disaster and whereas the amount of steel required and cost of building the bridge was greatly in excess of the cash originally estimated.

(c) "Whereas, there now remains unsold capital stock of the company in the approximate amount of $120,000.

[fol. 505] (d) "Whereas, it now becomes necessary for the company to raise sufficient funds with which to pay loans made to the company by the Phoenix Finance System, Inc., a greater portion of which is secured by mortgage on the property of the company and which is now past due.

(e) "Whereas, the company for these and other corporate purposes will be presently required to borrow not to exceed $100,000, to discharge these obligations and others which it is contemplated will presently arise.

(f) "Whereas, it is anticipated that additional funds, not to exceed $100,000 may from time to time be required to discharge present or future obligations of the company to provide for the payment of pavement and improvement of dike and to care for flood conditions and other emergencies.

(g) "Whereas, the company finds itself unable to acquire funds for these purposes except through the creation and issuance of bonds secured by mortgage deed of trust covering the assets, property and income of the property, and whereas the interests of the stockholders would be jeopardized unless such funds or a part thereof are made available within a reasonable time."

That the aforesaid preamble, statements and representations were misleading, false and fraudulent and made with intent to deceive and defraud the Bridge Company and its stockholders. That said meeting was wholly con-

trolled and dominated by John A. Thompson and his associates, officers and directors of the Phoenix Finance System, Inc. That other stockholders, relying on the aforesaid false and fraudulent statements contained in said letters and notice and believing the same to be true and knowing not to the contrary sent a proxy in the form afore- [fol. 506] said. That independent stockholders at said meeting relying on the aforesaid representations and believing the same to be true and not knowing the contrary voted for such resolutions, and independent and uncontrolled stockholders who voted for such resolutions did so on account of being deceived by the aforesaid false representations.

That following such special meeting, a directors' meeting was held, dominated and controlled by John A. Thompson, at which meeting a purported resolution was passed with respect to the $50,000. mortgage, and with reference to the issuance of the bonds therefor; that at said meeting it was represented and claimed by John A. Thompson that it was a valid and bona fide mortgage, and that said John A. Thompson did not disclose the fact that the alleged mortgage was not based on a proper consideration, and that the same was fraudulent; and that such independent directors as were present, voting for such resolution on the said representations of said John Thompson, believed the same to be true, knowing nothing to the contrary and were deceived thereby.

On January 5, 1932, a directors' meeting of the Bridge Company was held at which there were present four Thompson controlled directors, Emory H. English, Oscar R. Thorson, A. B. Wilder and M. White and no others, at which meeting these four Thompson Phoenix Finance System, Inc., directors passed a resolution to purchase from the Phoenix Finance System. Inc., 517 shares of Class A. preferred stock for $51,700., with interest at the rate of 6% from January 1, 1931, and to deliver Class B bonds of the Bridge Company in such face amount as would on the basis of 8% yield $51,700, with interest thereon which amounted to $60,500. of bonds. That neither on the 5th [fol. 507] day of January, 1932, nor at any time thereafter did the Iowa-Wisconsin Bridge Company have any surplus with which to make a repurchase of its own stock.

That while the Articles of Incorporation of the Bridge Company contain the provisions set forth in paragraph seven of the interveners' petition of intervention, and paragraph eleven of these findings of fact, the Bridge Company, through the influence of the said Thompson and his associates, caused $60,500. of said bonds to be issued to the said Thompson or his owned and controlled institutions. When that was done, there was outstanding other Class A stock held by other stockholders who were not given the permission or opportunity by the Bridge Company, as was the said Thompson and his affiliated companies, to surrender such Class A. Stock and receive bonds, as did the said Thompson and his institutions. That no notice of intention of the corporation to redeem said Class A shares was mailed or given to holders of said stock, as required by said paragraph seven of the Articles of Incorporation, except to the said Thompson and his controlled companies. That in other words, all of the said Class A stock was not purchased by the Bridge Company at said time through the issuance of the said bonds or otherwise, nor was a portion of the said Class A stock redeemed proportionately, as provided by the Articles of Incorporation set forth in paragraph seven of the petition of intervention and paragraph 11 of these findings. And at said time the said Class A stock was thus surrendered by the said Thompson without notice to the other stockholders similarly situated, and that such transaction took place without a legal authorizing vote, on the part of the stockholders or directors of the Bridge Company. That so far as Thompson and his associates were concerned, they were voting under the influence of Thompson, but so far as independent stock-[fol. 508] holders and directors were concerned, they did not know the true facts when they voted for the pretended authorizing resolution.

That when the said Thompson and his companies exchanged the said Class A stock for the said bonds in the amount of approximately $60,500, such action caused an impairment of the capital of the corporation in violation of said Delaware statute.

That the action of the said Thompson, in promoting said exchange of Class A stock for bonds, was fraudulent and for the purpose of conferring on himself a preference over

other holders of Class A Stock. That by thus conspiring and acting fraudulently the said Thompson did acquire a preference over other holders of such Class A stock.

That on March 7, 1932, a meeting of the board of directors of the Bridge Company was held at which were present Emory H. English, John A. Thompson, M. K. Thompson, Oscar R. Thorson, H. T. Wagner and A. B. Wilder, all Thompson and Phoenix Finance System, Inc., controlled directors, at which a purported resolution was adopted for the delivery of $97,000. of Class A bonds of the Bridge Company to the Phoenix Finance System, Inc. for the purported $50,000. mortgage and interest theron and for $10,000. to the Industrial Contracting Company, $9,000. to Kramer & Hogg and $11,262.71 to McClintic-Marshall Company, with interest on such items amounting to $83,811.29 and with discount on the bonds of $12,727.31, making a purported total of $96,538.58 and a purported balance of $461.42 being charged to Phoenix Finance System, Inc., on the books of the Bridge Company. making a total of $97,000.

The aforesaid $10,000. to the Industrial Contracting Company was neither due from nor paid by the Bridge Company as aforesaid and the Bridge Company did not owe [fol. 509] the $11,262.71 to McClintic-Marshall Company. That said two items were items that had been fully covered and disposed of by the Bridge Company in its settlement with John W. Shaffer & Co. and were items which Thompson & Company, subsidiary of Phoenix Finance System, Inc., had undertaken to pay. That as a part of the scheme, plan and conspiracy leading up to the issuance of said bonds hereinafter mentioned, the said Thompson paid the balance of $11,262.71 to McClintic-Marshall Company and as a form and pretense the said John A. Thompson, dominating and controlling the Bridge Company in its acts, in making payment thereof for the Phoenix Finance System, Inc., as aforesaid, attempted to carry out such transaction as though he was making payment thereof for the Bridge Company and caused false entries to be made on the books of the Bridge Company as though said approximate amount had been advanced by the Phoenix Finance System, Inc., to the Bridge Company and the item paid by the Bridge

Company when in fact the Bridge Company did not owe said item.

That on July 7, 1933, a meeting of the board of directors of the Bridge Company was held at which there were present John A. Thompson, Emory H. English, Oscar R. Thorson, H. T. Wagner, A. B. Wilder, M. K. Thompson and G. W. Huntley, all but one of the members present, G. W. Huntley, being Thompson-Phoenix Finance Corporation controlled directors. At this meeting vice-president Emory H. English and Secretary Thorson reported a purported indebtedness to the Phoenix Finance Corporation of $12,110.19 on open account and $5,625. on notes, $9,806.10 of said $12,110.19 being purported interest furnished by Phoenix Finance Corporation on the aforesaid fraudulent bonds held by the Phoenix, which were known to the officers of the Phoenix Finance Corporation to be fraudulent, and [fol. 510] $1505.75 being charged to the Bridge Company for Phoenix Finance Corporation officers and employes, and an item of $650. which was merely a journal entry and which neither the Bridge Company gained nor lost. During the period the officers of the Phoenix thus purportedly charged the Bridge Company for salaries of the Phoenix Finance System, Inc. officers and employes, the Bridge Company was paying for its own toll-keepers and was paying Thorson $400. per month as Secretary-Treasurer to take care of its accounts which did not require much bookkeeping and there was no occasion for charging the Bridge Company with the salaries of the Phoenix Finance System, Inc. officers and employes, because it had ample help of its own.

On motion of Wagner, seconded by Wilder, a resolution was adopted through the Thompson-Phoenix Finance Corporation controlled directors directing the execution of a demand note to the Phoenix for $12,110.19, to cover the purported items contained in said open account and instructing the treasurer to pledge $21,100. of the Class B Bridge Company bonds as collateral to this note and to two other purported notes, which latter notes are the ones set up in plaintiff's demand, one for $2,000. and one for $3,125., hereinafter further referred to.

At the time of the purported payment of interest on the purported bonds through an alleged loan of the Phoenix

Finance Corporation to the Bridge Company, John A. Thompson, Emory H. English and A. B. Wilder were directors and officers of the Phoenix Finance Corporation, and were also officers and directors of the Bridge Company and controlled its accounts and the debits and credits placed on the books of the Bridge Company, the actual entries being made by M. Graney, an employee and assistant sec- [fol. 511] retary of the Phoenix Finance Corporation. John A. Thompson and Emory H. English, to carry out a purported transaction as though the payment of interest were made by the Bridge Company, on the 7th day of February, 1933, made a deposit for the Phoenix Finance Corporation to the account of the Bridge Company in the sum of $6,896. and on the same date they drew three checks to the Bechtel Trust Co., one No. 189, for $6,480. payment of interest; one No. 190 for $15.00 payment of Government tax, and one No. 191 for $401.00 marked accounts payable, representing the charge of the Bechtel Trust Company, making the aggregate of $6,896. These checks on the part of the Bridge Company were all signed by M. Graney, employee of the Phoenix Finance Corporation. A check for $6,480. representing interest, was thereafter remitted to Phoenix Finance Corporation they being the holders of all the bonds on which interest was paid. On the 10th day of February, 1933, though the Bridge Company was paying interest on the bonds, the said Thompson and Emory H. English deposited to the account of the Bridge Company, by the Phoenix Finance Corporation, $2,910.00. At the same time a check was written on the account of the Bridge Company in the Iowa-Des Moines National Bank, No. 193, for $2,910.-00 to Bechtel Trust Company, being dated February 9th, 1933, payment of interest due January 1st, 1933, on Class A bonds held by Phoenix Finance Corporation. This check was also signed by M. Graney.

The purported interest payment on bonds was a mere manipulation of Thompson and officers and employees of the Phoenix Finance Corporation while controlling the Bridge Company and its books and accounts for the purpose of making it appear as though the Bridge Company paid interest on the fraudulent bonds and with the evident [fol. 512] purpose of attempting to create a supposed waiver in favor of the Phoenix Finance Corporation of the

fraudulent character of the bonds, or an estoppel, to the detriment of the Bridge Company.

Then there is an item of $109.86, being for claimed balance on the invalid and fraudulent exchange of 517 shares of stock for bonds.

That none of the aforesaid claims were valid claims. That at the time of the purported and pretended execution of each of the two notes set forth in plaintiff's demand, John A. Thompson—Phoenix Finance Corporation controlled and dominated the Iowa-Wisconsin Bridge Co., its officers and directors, and said John A. Thompson at said time was president of the Iowa-Wisconsin Bridge Company, and of the Phoenix Finance Corporation, and that both he and other directors of the Phoenix Finance Corporation, who were also directors of the Bridge Company, were acting in a dual capacity against the interests of the Bridge Company when they caused the execution of said notes if said notes were executed. At the dates of said pretended notes and their claimed execution, the Phoenix Finance Corporation was indebted to the Bridge Company in far greater amount than the amount of said notes. That at that time it was indebted to the Bridge Company in the sum of $3,000.00, for checks of the Bridge Company of that amount given to A. B. Wilder at the time of the execution of the fraudulent $50,000.00 mortgage, without consideration, which $3,000.00 had not been repaid to the Bridge Company. That the conspirators, John A. Thompson, Phoenix Finance Corporation, and Thompson & Company, were jointly and severally liable therefor, and said notes were offset by the $3,000.00 thus wrongfully appropriated from the Bridge Company, and disbursed, $2,000.00 to A. B. Wilder, and $1,000.00 check to Thompson & Company, and were further offset by the fact that the Phoenix Finance System, Inc., and its successor, the Phoenix Fi-
[fol. 513] nance Corporation, also owed the Bridge Company $14,000.00, with interest thereon from November, 1930, for Bridge Company stock which it had received fraudulently without consideration, and charged to promotion, through the dominant control of John A. Thompson, and offset by other items due the Bridge Company from the Phoenix Finance Corporation. That at the date of

said purported notes mentioned in plaintiff's demand, the Phoenix Finance Corporation was indebted to the Bridge Company in a far greater amount than the amount of said purported notes, and if at that time the Phoenix Finance Corporation made any payment to or put any funds into the account of the Bridge Company, it was merely a partial payment on what was due the Bridge Company from the Phoenix Finance Corporation, and did not furnish any basis or consideration for the execution of said purported notes, and said notes are without consideration, which fact was well known to the said John A. Thompson and the Phoenix Finance Corporation; that said purported notes are not under seal, and that said notes were never lawfully executed and delivered.

That all of the aforesaid acts and transactions were part and parcel of a plan, scheme and conspiracy on the part of the said John A. Thompson, and Phoenix Finance Corporation, and its predecessor and associates, and done with the fraudulent intent and purpose of cheating and defrauding the Bridge Company and its stockholders out of its property, and to acquire the ownership of said Bridge Company's property to the exclusion of the Bridge Company and its stockholders; and as a part of said fraudulent scheme and plan caused the bonds aforesaid to be issued and trust deed purported to secure the same to be executed without lawful consideration to the Bridge Company.

[fol. 514] That the Phoenix Finance Corporation, at the time it was organized, was officered and controlled by the same officers as Phoenix Finance System, Inc., and took over the succession both of assets and liabilities, with full notice of the facts and circumstances surrounding the bond issue in controversy in this case, and assumed the entire fruits and activities of its predecessor, so far as concerns this case, and proceeded to carry on with the same notice and purpose, adopting all of the plans and results of its predecessor.

That in the aforesaid trust deed securing the aforesaid bonds, Bechtel Trust Company, an Iowa corporation (now First Trust & Savings Bank), and A. H. Schubert, a citizen of Wisconsin, were named as trustees, and on the 28th of August, 1933, filed a bill of foreclosure at the instance

of the Phoenix Finance Corporation and with an arrangement that said suit would be instituted and prosecuted and the Phoenix Finance Corporation would save and keep harmless such trustees from all costs, expenses and liabilities, including attorneys' fees connected with the case. That said suit was filed in the United States District Court for the Northern District of Iowa, in the name of Bechtel Trust Company, an Iowa corporation (now First Trust & Savings Bank) and A. H. Schubert, a citizen of Wisconsin, as trustees complainants, vs. Iowa-Wisconsin Bridge Company, a Delaware corporation, defendant, for the foreclosure of the aforesaid trust deed and bonds; that the aforesaid trust deed securing the aforesaid bond issue of $2000,000.00, purportedly covered all of the property of the Iowa-Wisconsin Bridge Company.

[fol. 515] The trust deed, which is in the ordinary form of a mortgage trust deed securing a bond issue, made it the duty of the Bridge Company to pay taxes on the mortgaged property, to pay interest on the bonds, and to pay the bonds as they matured. In case of default for a period of sixty (60) days it was provided that the trustees may, and upon the written request of the holders of twenty-five per cent of the bonds then in default, shall declare the principal of all the bonds due, and "shall proceed to protect and enforce their rights and the rights of the bondholders, under this Indenture by a suit or suits in equity, or at law * * * by * * * foreclosure hereunder, or for the enforcement of any other appropriate legal or equitable remedy as the trustees * * * shall deem most effectual."

It is further provided in the trust deed that no holder of any bond or coupon secured hereby shall have any right to institute any suit, action, or proceeding in equity or law, for the foreclosure of this Indenture * * or for any other remedy hereunder, except in case the trustees after notice and demand refuse to act. The said suit was commenced by the trustees at the request of the Phoenix Finance Corporation as the holder of more than twenty-five percent of the bonds, and was prosecuted by attorneys selected by it. The bill alleged jurisdiction based upon diversity of citizenship, the authority of the trustees to sue under the terms of the trust deed, default, and accelera-

tion of due date, and the prayer was for foreclosure for all of the bonds, including those issued on or as collateral for the aforesaid notes mentioned in plaintiff's demand. The prayer was:

"That an account be taken of the bonds and interest coupons secured by said mortgage deed of trust, and the amount due on the said bonds for principal and interest or otherwise, * * * that said Iowa-Wisconsin Bridge Company be decreed to pay the amount found due * * within a shot day to be fixed by the court, and that in default of said payment the mortgaged property be sold to satisfy [fol. 516] the amount found due and costs, and in case of such sale the defendant, Iowa-Wisconsin Bridge Company, and all persons claiming by, through or under it, may be forever barred or foreclosed of all equity of redemption,"

and prayed the appointment of a receiver, etc. A copy of the trust deed was attached to the bill, in the usual form.

The defendant bridge company filed answer September 25, 1933, admitting the jurisdiction of the court, the execution of the trust deed and the issuance of the bonds; denying complainants' right to the appointment of a receiver; alleging that a part or all of the bonds secured by the trust deed were invalid; and praying the protection of the court. On September 26, 1933, the court appointed a receiver of all of the property of the Bridge Company with direction to take immediate possession and to operate its business.

On December 5, 1933, by leave of court, Fayette D. Kendirck, a stockholder of the Bridge Company and citizen of Minnesota, intervened on behalf of defendant, himself and all other stockholders similarly situated, praying that the complainants' bill be dismissed, the bonds cancelled and the deed of trust set aside. He alleged that all of the bonds and the mortgage deed of trust were issued as a part of a fraudulent scheme, plan and conspiracy, with intent to cheat and defraud the Bridge Company and its stockholders out of their property. That the bonds and mortgage were fraudulent, without consideration, invalid and void, and were procured by John A. Thompson and his associated in conspiracy, officers and directors of the Phoenix Finance System, Inc., predecessor of petitioner,

by dominating and controlling the Bridge Company and by acting as officers and directors of the latter. That none [fol. 517] of the bonds had passed to innocent purchasers for value without notice. That the said John A. Thompson and his associates in conspiracy were still in control of the defendant Bridge Company and that demand by interveners to obtain relief from or through said defendant corporation would be unavailing. On November 5, 1933, the court granted the intervention.

After the filing of the petition of intervention, which by order of court was permitted to stand as an answer in behalf of the defendant, Iowa-Wisconsin Bridge Company, the interveners moved the court for permission to bring in the Phoenix Finance Corporation, holder and owner of about ninety- per cent of the outstanding bonds, as a co-plaintiff with the trustees. This motion was granted. Thereafter Phoenix Finance Corporation appeared and filed answer to the petition of intervention. The trustees filed a more complete reply to the petition of intervention as amended. The trustees filed a resistance to interveners' application for the production of books and papers of Phoenix Finance Corporation. The court entered an order that the Phoenix Finance Corporation produce all of its books and records pertaining to the business and affairs of the Iowa-Wisconsin Bridge Company, but such books, records and papers were never produced.

On December 3, 1934, all counsel for the parties agreeing, the court appointed a special master to hear all the issues and report his findings of fact and conclusions of law. The Master after taking the evidence, filed his report the 15th day of March, 1936, to which all parties filed excep- [fol. 518] tions, including the Phoenix Finance Corporation. A hearing was had on the exceptions before the court and on the 1st day of December, 1936, the court entered its decree: "that the mortgage and bonds in suit were fraudulently issued; that all bonds are without consideration with the exception of the bonds aggregating $15,000.00,", which were specified, and those bonds were other than those held by the Phoenix Finance Corporation, held by individuals.

That the considerations and matters relating to the purported notes set forth in plaintiff's demand, and the bonds issued on said notes or as collateral for the payment thereof, and the considerations and other matters connected therewith, were fully litigated as part of the issues in said cause, and the court's decree that all bonds held by the Phoenix Finance Corporation were without consideration, and it has been determined by the court that the alleged notes mentioned in the demand were more than offset by what the Phoenix Finance Corporation owed the Bridge Company. That a copy of the court's decree is hereto attached, marked Exhibit "A", and made a part hereof. That the decision of the trial court was reported in 19 Fed. Supp. 127. That from the eecition of the trial court the complainants, including the Phoenix Finance Corporation, took an appeal to the Circuit Court of Appeals for the Eighth Circuit, and the Circuit Court of Appeals has rendered its opinion and order affirming the decision of the trial court, which is reported in 98 Fed. (2d), 416.

That the Phoenix Finance Corporation filed a petition for certiorari in the United States Supreme Court, to which the defendant, Bridge Company will in a few days, and within the time allowed by the rules of said Court, file brief in opposition.

[fol. 519] That by reason thereof the alleged cause of action now demanded on by the plaintiff has been fully adjudicated and settled, by said judgment and decree, and the same is now res adjudicata.

IRENE M. BELL.

Sworn to and subscribed the day and year aforesaid before me.

(Seal)

F. T. BARRETT,
Notary Public in and for
Cerro Gordo County, Iowa.

My commission expires July 4th, 1939.

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[fol. 520] Final Decree, December 1, 1936.

United States District Court, Northern District of Iowa, Eastern Division.

First Trust & Savings Bank, formerly named Bechtel Trust Company, and A. H. Schubert, Trustees, Plaintiffs,
No. 220. vs. Equity.
Iowa-Wisconsin Bridge Company, Defendant,

Fayette D. Kendrick, et al., Interveners.

The above entitled cause came before the Court on the first day of December, 1936, it being the first day of the December 1936 Term of this Court, for the filing of opinion, ruling upon exceptions to the Master's Report, taking final submission of the cause upon the Master's Report and his advisory findings and the evidence in the cause, and the entry of a Final Decree.

On the 5th day of December 1934, the cause being at issue and upon the trial docket, was referred to the Hon. James W. Kindig, as Master in Chancery to take the evidence in the cause and report findings of fact and conclusions of law. On the 10th day of March, 1936, the Master having taken all of the evidence in the cause, filed his report, embodying his findings and conclusions, and thereafter exceptions were filed to said report by the First Trust & Savings Bank formerly named Bechtel Trust Company, and A. H. Schubert, Trustees, and Phoenix Finance Corporation, plaintiffs, and by defendant and interveners. And on the 13th day of June 1936, all respective parties appearing by their counsel, and by agreement of all parties all exceptions to the Master's Report were argued and submitted at the United States Court Room at Fort Dodge, in the Central Division of this District. And thereafter the Court received briefs from all counsel, examined and considered the Master's Report and also all evidence taken before the Master. And the Court now being fully advised in the premises, makes and enters the following rulings:

The exceptions of the plaintiffs, trustees, numbered one to eight inclusive, and of Phoenix Finance Corporation, numbered one to six inclusive, are overruled and exceptions are reserved to the respective plaintiffs. Defendant and interveners' exceptions numbered one, two, five and

ten having been withdrawn, are not further noticed. Defendant and interveners' exceptions numbered three, four, six and seven are overruled, and exceptions reserved to [fol. 521] the defendants and interveners. And defendant and interveners' exceptions numbered eight, nine and eleven are sustained, with exceptions reserved to all opposing parties.

The Court having ruled upon all exceptions, and allowed exceptions to all rulings, now takes final submission of the cause upon the Master's advisory report, findings and conclusions, and upon all evidence taken before the Master and upon depositions filed in the cause and introduced before and considered by the Master.

And the Court now being fully advised in the premises, it is Ordered, Adjudged and Decreed that the findings and conclusions of the Master, except as modified and amplified by additional findings, be adjudged as the findings and conclusions of the Court, with such additional findings and conclusions as are filed in the cause. That the mortgage and bonds in suit were fraudulently issued. That all bonds are without valid consideration, with the exception of the bonds aggregating $15,000., hereinafter specified. That the bill of the plaintiffs be dismissed as to the plaintiff, Phoenix Finance Corporation, and that the prayer of the bill be denied, except in so far as the Decree provides for the protection of the holders of said $15,000. in bonds. That foreclosure and sale of the mortgaged property be denied, but that in lieu thereof all earnings and revenues of the Iowa-Wisconsin Bridge Company over and above such as may be absolutely necessary to pay maintenance, operating expenses and taxes, be sequestered and impounded for the purpose of paying the following bonds with interest, to-wit, $4000 in bonds, due Bradshaw, Schenk and Fowler, $6000. in bonds, due Helmer N. Anderson and $1000 in bonds due each of the following, Laura B. Baker, J. W. Dempsey, Lyle Sign Company, M. B. Stone and Cobb, Hoke, Benson, Krause and Faegre, or their respective assigns. That the property be retained under receivership until these obligations, with interest, are fully paid either out of the revenues sequestered as aforesaid, or by other funds found and furnished by the Bridge Company.

Jurisdiction is hereby reserved to deal with all matters arising under the receivership and in connection with adjustment and payment of taxes and counsel fees.

It is Further Ordered, Adjudged and Decreed that the entire costs in the case be taxed to the plaintiffs, First Trust & Savings Bank, formerly named Bechtel Trust Company, and A. H. Schubert, Trustees, and Phoenix Finance Corporation. To all of which the plaintiffs have duly excepted.

GEO. C. SCOTT,
United States District Judge.

Filed in the District Court, December 1, 1936.

[fol. 522] In the Superior Court of the State of Delaware,
In and For New Castle County.

November Term, A. D. 1938.

Summons Case.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,
No. 39. vs.
Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

New Castle County:—ss.:

Iowa-Wisconsin Bridge Company, a corporation of the State of Delaware, the defendant in this suit, was summoned to answer Phoenix Finance Corporation, a corporation of the State of Delaware, the plaintiff in this suit, of a plea of trespass on the case upon promises, and thereupon the said plaintiff, by Marvel, Morford & Logan, its attorneys, complains:

For That Whereas, the said defendant, heretofore, to-wit, on the 15th day of December, A. D. 1932, at Des Moines, in the County of Polk, State of Iowa, to-wit at New Castle County aforesaid, made its certain promissory note in writing, bearing date the day and year aforesaid, and thereby then and there promised to pay, on the 15th day of June,

A. D. 1933, to the said plaintiff, or order, the sum of Two [fol. 523] Thousand Dollars ($2,000.00) for value received, and then and there delivered the said promissory note to the said plaintiff; by means whereof and by force of the statute in such cases made and provided, it, the said defendant, then and there became liable to pay to the said plaintiff the said sum of money in the said promissory note specified, according to the tenor and effect of the said promissory note; and being so liable, it, the said defendant, in consideration thereof, afterwards, to-wit on the day and year aforesaid, at New Castle County aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sum of money in the said promissory note specified, according to the tenor and effect thereof.

And Whereas, Also, the said defendant, heretofore, to-wit, on the 15th day of December, A. D. 1932, at Des Moines, in the County of Polk, State of Iowa, that is to say at New Castle County aforesaid, made its certain promissory note in writing, bearing date the day and year aforesaid, and thereby then and there promised to pay at 316 12th Street, Des Moines, Iowa, on the 15th day of June, A. D. 1933, to the said plaintiff, or order, the sum of Two Thousand Dollars ($2,000.00) for value received, and then and there delivered the said promissory note to the said plaintiff; by means whereof and by force of the statute in such cases made and provided, it, the said defendant, then and there became liable to pay to the said plaintiff the said sum of money in the said promissory note specified, according to [fol. 524] the tenor and effect of the said promissory note; and being so liable, it, the said defendant, in consideration thereof, afterwards, to-wit on the day and year aforesaid, at New Castle County aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sum of money in the said promissory note specified, according to the tenor and effect thereof.

And Whereas Also, the said defendant, heretofore, to-wit, on the 20th day of January, A. D. 1933, at Des Moines, in the County of Polk, State of Iowa, to-wit at New Castle County aforesaid, made its certain promissory note in writing, bearing date the day and year aforesaid, and thereby then and there promised to pay, on the 20th day of July,

A. D. 1933, to the said plaintiff, or order, the sum of Three Thousand One Hundred and Twenty-five Dollars ($3,125.00) for value received, and then and there delivered the said promissory note to the said plaintiff; by means whereof and by force of the statute in such cases made and provided, it, the said defendant, then and there became liable to pay to the said plaintiff the said sum of money in the said promissory note specified, according to the tenor and effect of the said promissory note; and being so liable, it, the said defendant, in consideration thereof, afterwards, to-wit on the day and year aforesaid, at New Castle County aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sum of money in the said promissory note specified, according to the tenor and effect thereof.

[fol. 525] And Whereas, Also, the said defendant, heretofore, to-wit, on the 20th day of January, A. D. 1933, at Des Moines, in the County of Polk, State of Iowa, that is to say at New Castle County aforesaid, made its certain promissory note in writing, bearing date the day and year aforesaid, and thereby then and there promised to pay at 316 12th Street, Des Moines, Iowa, on the 20th day of July, A. D. 1933, to the said plaintiff, or order, the sum of Three Thousand One Hundred and Twenty-five Dollars ($3,125.00) for value received, and then and there delivered the said promissory note to the said plaintiff; by means whereof and by force of the statute in such cases made and provided, it, the said defendant, then and there became liable to pay to the said plaintiff the said sum of money in the said promissory note specified, according to the tenor and effect of the said promissory note; and being so liable, it, the said defendant, in consideration thereof, afterwards, to-wit on the day and year aforesaid, at New Castle County aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sum of money in the said promissory note specified, according to the tenor and effect thereof.

And Whereas, Also, the said defendant, afterwards, to-wit, on the 15th day of June, A. D. 1938, at Des Moines, in the County of Polk, State of Iowa, that is to say at New

Castle County aforesaid, was indebted to the said plaintiff in the sum of Five Thousand One Hundred and Twenty-five [fol. 526] Dollars ($5,125.00), for so much money by the said plaintiff before that time lent and advanced to the said defendant at its like instance and request.

And Whereas Also, the said defendant afterwards, to-wit, on the 20th day of January, A. D. 1933, at Des Moines, in the County of Polk, State of Iowa, that is to say, at New Castle County aforesaid, was indebted to the said plaintiff in the further sum of Two Thousand Five Hundred Dollars ($2,500.00) for so much money before that time and then due and payable from the defendant to the said plaintiff for interest upon and for the forbearance of divers large sums of money before then lent and advanced by the said plaintiff to the said defendant at its special instance and request, and by it the said plaintiff forborne to the said defendant for divers long spaces of time, before then elapsed, at the like special instance and request of the said defendant, and also for other money, before that time and then due and payable from the said defendant to the said plaintiff for interest upon and for the forebearance of divers other large sums of money before then due and owing from the said defendant to the said plaintiff, and by it, the said plaintiff, forborne to the said defendant for divers large spaces of time before then elapsed, at the like special instance and request of the said defendant.

And, being so indebted, it, the said defendant, in consideration thereof, afterwards, to-wit, on the day and year aforesaid, at Des Moines, in the County of Polk, State of Iowa, that is to say at New Castle County aforesaid, undertook and then and there faithfully promised the said plain- [fol. 527] tiff to pay it the said aforementioned sums of money when it, the said defendant, should be thereunto afterwards requested.

Nevertheless, the said defendant, not regarding its said several promises and undertakings in this behalf, did not pay to the said plaintiff the several sums of money above mentioned or any of them or any part thereof, although often requested so to do; but the said defendant hath hereunto neglected and refused and still doth neglect and refuse to pay the same to the said plaintiff, to the damage of the

said plaintiff of the sum of Ten Thousand Dollars ($10,000.00) and therefore it brings its suit, &c.

MARVEL, MORFORD & LOGAN,
Attorneys for Plaintiff.

[fol. 528] Copy of Instruments Sued Upon.

$3,125.00 Des Moines, Iowa, Jan. 20, 1933.

On the 20 day of July, 1933, for value received, We promise to pay to the order of Phoenix Finance Corporation the sum of Thirty-one hundred twenty-five and no/100 Dollars Payable at 316 12th Street, Des Moines, Iowa. with interest at 8 per cent per annum from date. Interest payable semi annually.

Upon default of payment of this note, the makers, endorsers, guarantors, and sureties, agree to pay all attorneys' fees and expenses of collection, and consent that any justice of the peace may have jurisdiction on this note to the amount of $300.00, and ..... hereby severally waive demand of payment, protest, and notice of protest of this note and consent that time of payment may be extended without notice. A failure to pay interest when due, shall cause this note to become due.

IOWA-WISCONSIN BRIDGE COMPANY,
By Oscar R. Thorson,
Secretary-Treasurer.

P. O. Address .....

No. .....

[fol. 529] $**2,000.00** Des Moines, Iowa, December 15, 1932.

On the 15 day of June, 1933, XXXXX for value received we promise to pay to the order of Phoenix Finance Corporation the sum of Two Thousand and No/100 Dollars Payable at 316 12th Street, Des Moines, Iowa, with interest at 8 per cent per annum from date. Interest payable semi-annually.

Upon default of payment of this note, the makers, endorsers, guarantors, and sureties, agree to pay all attorneys' fees and expenses of collection, and consent that any justice of the peace may have jurisdiction on this note to the amount of $300.00, and we hereby severally waive demand of payment protest, and notice of protest of this note and consent that time of payment may be extended without notice. A failure to pay when due, shall cause this note to become due.

IOWA-WISCONSIN BRIDGE COMPANY,
By Oscar R. Thorson,
Secretary-Treasurer.

P. O. Address .....

No. .....

[fol. 530] Bill of Particulars.

For money lent and advanced to Iowa-Wisconsin Bridge Company by Phoenix Finance Corporation, to-wit, on or about the 15th day of December, A. D. 1932	$2,000.00
For interest due and owing upon the above sum of money by Iowa-Wisconsin Bridge Company to Phoenix Finance Corporation from the 15th day of December, A. D. 1932 to date	1,000.00
For money lent and advanced to Iowa-Wisconsin Bridge Company by Phoenix Finance Corporation, to-wit, on or about the 20th day of January, A. D. 1933	3,125.00
For interest due and owing upon the above sum of money by Iowa-Wisconsin Bridge Company to Phoenix Finance Corporation from the 20th day of January, A. D. 1933 to date	1,500.00

[fol. 531] In the Superior Court of the State of Delaware
In and For New Castle County.

November Term, A. D. 1938.

Summons Case.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 39. vs.

Iows-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

Dec. 28, 1938. Def't. pleads, with copy.

Rule reps & issues by second general rule day in January.

[fol. 532] In the Superior Court of the State of Delaware
In and For New Castle County.

November Term, A. D. 1938.

Summons Case.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 39. vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

The defendant pleads to each and every count of the plaintiff's declaration, as follows:

1. Non Assumpsit.
2. Statute of Limitations.
3. Payment.
4. Accord and satisfaction.
5. Set-off.
6. Release.

7. Res Adjudicata.

WARD and GRAY,
Attorneys for Defendant.

[fol. 533] In the Superior Court of the State of Delaware
In and For New Castle County.

November Term, A. D. 1938.

Summons Case.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 39. vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

Jan. 20, 1939. Plaintiff enters reps & issues.

[fol. 534] In the Superior Court of the State of Delaware
In and For New Castle County.

November Term, A. D. 1938.

Summons Case.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 39. vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

The plaintiff above-named, by Marvel, Morford and Logan, its attorneys, enters reps. and issues to each of the pleas filed by the defendant in the above-stated cause.

MARVEL, MORFORD & LOGAN,
Attorneys for Plaintiff.

[fol. 535] In the Superior Court of the State of Delaware In and For New Castle County.

November Term, A. D. 1938.

Summons Case.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 39. vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

March 6, 1939. Petition filed by Ward & Gray, Esqs. for Commissioners to take testimony.

[fol. 536] (Petition of Defendant for Appointment of Commissioners to take Testimony of John W. Shaffer, et al.)

In the Superior Court of the State of Delaware in and for New Castle County

Summons Case

November Term A. D. 1938.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 39 vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

To The Honorable Richard S. Rodney, Judge In The Superior Court Of The State Of Delaware,

And Now, to-wit, this Sixth day of March, A. D. 1939, the defendant in the above entitled cause by Ward and Gray, its attorneys, in pursuance and by virtue of Rule 62 of the Superior Court of the State of Delaware, hereby makes application to the Honorable Richard S. Rodney, one of the Judges of the Superior Court of the State of

Delaware, in and for New Castle County, for the appointment of Commissioners to take the testimony of John W. Shaffer, Margaret E. Lockhart, J. R. Smith, M. E. Mortenson, Dwight F. Johns, Arthur I. Prendergast, Avery F. Crounse, Vernon W. O'Connor, George E. Rodgerson, Fayette D. Kendrick, George C. Dittman, who reside without the State of Delaware, without written interrogatories filed, upon oral examination and subject to cross-examination and re-examination by the parties or their attorneys.

WARD AND GRAY,
Attorneys for Defendant.

[fol. 537] (Order appointing Commissioner to take Testimony.)

In the Superior Court of the State of Delaware in and for New Castle County

Summon Case

November Term A. D. 1938.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 39 vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

To The Honorable Richard S. Rodney, Judge In The Superior Court Of The State Of Delaware:

And Now, to-wit, this sixth day of March, A. D. 1939, the foregoing application having been presented,

It Is Ordered that a Commission issued to John A. Mansfield, 501 New York Life Building, Minneapolis, Minnesota, to take the testimony of John W. Shaffer, Margaret E. Lockhart, J. R. Smith, M. E. Moretenson, Dwight F. Johns, Arthur I. Prendergast, Avery F. Crounse, Vernon W. O'Connor, George E. Rodgerson, Fayette D. Kendrick, and George C. Dittman, and such other witnesses as may be presented on behalf of the defendant in the above stated cause without written interrogatories filed, upon oral ex-

amination and subject to cross-examination and re-examination by the parties or their attorneys; said testimony to be taken in the State of Minnesota, to be taken at a time and place to be fixed by the said John A. Mansfield, Commissioner, and the attorney for the plaintiff is to be given ten days' notice, of the time and place for the examination [fol. 538] of witnesses and said commission shall be returnable not later than the 28th day of April A. D., 1939.

And It Is Further Ordered, that a commission issue to Howard L. Bump, Crocker Building, Des Moines, Iowa, to take the testimony of Madge White, Oscar Thorson, and such other witnesses as may be presented on the behalf of the defendant in the above stated cause, who reside without the State of Delaware, without written interrogatories filed, upon oral examination and subject to cross-examination and re-examination by the parties or their attorneys; said testimony to be taken in the State of Iowa, to be taken at a time and place to be fixed by the said Howard L. Bump, Commissioner, and the attorney for the plaintiff is to be given ten days' notice, of the time and place for the examination of witnesses and said commission shall be returnable not later than the 28th day of April A. D. 1939.

And It Is Further Ordered, that a commission issue to F. A. O'Connor, Dubuque, Iowa, to take the testimony of Lee McNeely, and such other witnesses as may be presented on the behalf of the defendant in the above stated cause, who reside without the State of Delaware, without written interrogatories filed, upon oral examination and subject to cross-examination and re-examination by the parties or their attorneys; said testimony to be taken in the State of Iowa, to be taken at a time and place to be fixed by said F. A. O'Connor, Commissioner, and the attorney for the plaintiff is to be given ten days' notice, of the time and place for the examination of witnesses and said commission shall be returnable not later than the 28th day of April A. D. 1939.

RICHARD S. RODNEY,

J.

[fol. 539] (Stipulation That Pleadings be omitted from Commissions to take Testimony, etc.)

In the Superior Court of the State of Delaware in and for New Castle County

November Term A. D. 1938.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 39 vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

It Is Hereby Stipulated By and between Arthur G. Logan, Esq., attorney for plaintiff in the above entitled cause, and Daniel F. Wolcott, Esq., one of the attorneys for the defendant in the above entitled cause, that copies of the pleadings in the above entitled cause be omitted from the Commissions to take testimony outside of the State of Delaware issued pursuant to the Order of the Superior Court of the State of Delaware in and for New Castle County on the Sixth day of March, A. D. 1939.

ARTHUR G. LOGAN,
Attorney for Plaintiff.

DANIEL F. WOLCOTT,
Attorney for Defendant.

[fol. 540] In the Superior Court of the State of Delaware in and for New Castle County

Summons Case

November Term, A. D. 1938.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 39 vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

Mar. 7, 1939. Exit Commission to Howard L. Bump, Des Moines, Iowa.

Mar. 7, 1939. Exit Commission to John A. Mansfield, Minneapolis, Minn.

Mar. 7, 1939. Exit Commission to F. A. O'Connor, Dubuque, Iowa.

May 3, 1939. Affidavit for continuance filed.

[fol. 541] Affidavit for Continuance

In the District Court of the State of Delaware in and for New Castle County

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

State of Iowa,
Cerro Gordo County—ss.:

I, Irene M. Bell, being first duly sworn on oath depose and say that I am Secretary and Treasurer of the Iowa-Wisconsin Bridge Company and that the following witnesses are sought to be examined: John W. Shaffer, Margaret E. Lockhart, J. R. Smith, M. E. Mortenson, Dwight F. St. Johns, Arthur I. Pendergrast, Avery F. Crounse, Vernon O'Connor, George E. Rodgerson, Fayette D. Kendrick, George C. Dittman, Madge White, Oscar R. Thorson, Andrew Gullickson, T. H. Bakewell, Mrs. E. J. Parman, Lee McNeely. That none of said witnesses are residents of Delaware and cannot be reached by subpoena and if present would testify to the following facts:

John W. Shaffer That in October or November 1930, through negotiations with J. W. Shaffer and Vernon O'Connor, John A. Thompson became president and acquired control of the Iowa-Wisconsin Bridge Company and that at the same time the number of directors of the bridge

[fol. 542] company was increased and Thompson, together with other directors of the Phoenix Finance System, Inc., (Predecessor of Phoenix Finance Corporation) became directors of the Iowa-Wisconsin Bridge Company, and that from that time on Thompson and Phoenix controlled the bridge company; that at that time Thompson acquired and had full knowledge of the contents of certain contracts and assignments thereof and of subcontracts and the relationship of the parties thereto between themselves and the bridge company, one of such contracts being a contract let by Standard Shares Holding Company as Trustee for the bridge company, acting by John W. Shaffer, wherein it was contracted with Vernon W. O'Conner, Shaffer's partner and co-promoter, to erect the sub-structure of the bridge, said contract calling for the payment of a total of $193,196.80, estimates to be approved and work to be accepted by Shaffer as engineer for the bridge company; that the approval of this contract by the bridge company was signed by Shaffer as Secretary of the bridge company; that the contract was immediately sub-let by O'Conner to the Industrial Contracting Company for a maximum total of $120,748.00; and then on April 4, 1930 this contract was assigned by O'Conner to John W. Shaffer and Company; that the amount actually paid the sub-contractor for completion of this work was $97,971.36. On November 26, 1930 a stated settlement as of October 31, 1930 was made between the Standard Shares Holding Company and the Bridge Company, under which there were delivered to the Bridge Company by its trustees, liquid assets, such as cash, bills and accounts receivable, stocks and bonds, in-[fol. 543] ventoried at $90,235.68; construction accounts representing amounts which had been paid for construction to date aggregating $183,496.90, and equipment, etc., amounting to $1,986., and commission and organization and expense accounts amounting to $75,231.08, making a total of $350,950., and there had been sold by said trustee for the account of the Bridge Company stock of the latter at $100 per share, amounting to $350,950. The settlement also provided for the return of all stock of the Bridge Company held by said trustee except 1500 shares of Class B stock, which were returned to the Bridge Company in consideration of a so-called management contract, the

terms of which are immaterial in this litigation. On the $90,835 of liquid assets, there was later realized over $79,000 in cash and the Bridge Company had treasury stock in the amount of $390,050 to build its superstructure and complete its bridge. The substructure was practically complete and the sub-contractor thereof had been paid within $8300 of the total cost and the grading was well under way.

Under date of November 11, 1930 a contract for the completion of the bridge was entered into between the Bridge Company, acting through John A. Thompson as president and John W. Shaffer & Company, which included erection of super-structure of the bridge, erection of piles and trestles over certain slough, erection of toll house, etc., and surfacing of roadway and whereby the Bridge Company agreed to and did pay $10,000 in cash and agreed to and did deliver 3200 shares of its capital stock at a fixed price of $320,000, to John W. Shaffer & Company, and Shaffer & Company in said contract agreed to furnish a surety bond to insure the obligations of said Shaffer & Company. Extras were required to be ordered in writing. John W. [fol. 544] Shaffer & Company sub-let the contract for steel to McClintic-Marshall Company and let the construction work to the Industrial Contracting Company.

In November 1930, immediately after the issuance of said 3200 shares of stock to Shaffer & Company, the latter company sold said stock to Thompson & Company and received the promissory note of Thompson & Company for $224,000 therefor.

That on or about the 1st day of November 1930 140 shares of bridge company stock were issued to the Phoenix Finance System, Inc. and the value thereof fixed at $100 per share, to-wit: $14,000 and that such stock was issued without lawful consideration and disposed of by the Phoenix Finance System, Inc. to the public; that thereafter John A. Thompson, then president of the bridge company, dominating and controlling the bridge company, caused the execution of a purported guaranty contract, providing for the turning over to the Phoenix Finance System, Inc. such stock without payment therefor; that in such transaction John A. Thompson acted in a dual capacity, as president of the bridge company and as president of the

Phoenix Finance System, Inc.; that John W. Shaffer and Company did not receive $25,000 on sub-structure, $5000 on grading and $5000 on engineering entered on the books of the bridge company as part of purported consideration for $50,000 mortgage on the bridge company's property to the Phoenix Finance System, Inc.; that such payments were not made. That A. B. Wilder, who was a director of Phoenix Finance System, Inc. and of the Iowa-Wisconsin Bridge Company did not perform any services for the bridge company warranting the payment of about $3000 to him about March 1st 1931.

[fol. 545] Margaret E. Lockhart That she kept the books and records of John W. Shaffer and Company; that the alleged payments of $25,000 on sub-structure, $5,000 on grading and $5000 on engineering were not made to John W. Shaffer & Company and to identify and to prove the books and records of said John W. Shaffer and Company.

J. R. Smith To identify certain bank accounts of Vernon O'Conner and to show what accounts were kept in the Northwest National Bank and Trust Company of Minneapolis, Minnesota, relating to the matters involved.

M. E. Mortenson To show that he is or was the Assistant Cashier of the Marquette National Bank of Minneapolis, Minnesota in 1930 and 1931 and to show an escrow account carried by Phoenix Finance System, Inc. in the trust department and the facts with respect to it and an account of the Iowa-Wisconsin Bridge Company and an account of John W. Shaffer and Company.

Dwight F. St. Johns To show that he is the United States Army District Engineer for the District of St. Paul and that he had an audit made under his supervision as to the cost of the Iowa-Wisconsin bridge and that the cost thereof was not as reported, and was less than set up on the bridge company books, and that said $14,000 of stock was issued without consideration, as well as other items of costs that were stated.

Arthur I. Pendergrast and Avery F. Crounse That they were sub-contractors for the construction of the substructure of the bridge and that they entered into a contract

with respect thereto for a miximum total of $120,748.00 and that the actual amount paid them for the completion of the work was $97,971.36.

[fol. 546] Vernon O'Conner. That the Phoenix Finance System, Inc., through its president, John A. Thompson, was in control of the Iowa-Wisconsin Bridge Company; that Vernon O'Conner, on the misrepresentations of John A. Thompson, signed a purported guaranty contract, whereby the Phoenix Finance System, Inc., procured $14,000 of bridge company stock; that he signed such contract without reading it or knowing its contents.

George E. Rodgerson That about February 5, 1931, John A. Thompson engaged Elliott-Rodgerson Company as brokers to sell stock purchased by Thompson & Company from Shaffer & Company and personally and on behalf of Phoenix Finance System, Inc., represented to the public that there would be no mortgage or bonds placed against the bridge and said Phoenix Finance System, Inc. represented and agreed in writing signed by John A. Thompson as president that there was no funded indebtedness against the bridge and that Phoenix Finance System, Inc. had unconditionally guarantedd the payments to McClintic-Marshall Company and to Industrial Contracting Company, and had agreed to pay for the completion of the bridge; that if all the money to be paid sub-contractors was not raised through stock sales as needed, the deficiency would be promptly supplied by Phoenix Finance System, Inc. to be repaid to it as later stock sales accumulated funds for that purpose. Thompson did not disclose any purported contract of indemnity by the Bridge Company to Phoenix Finance System, Inc. or that he had any intention of placing any mortgage on the bridge.

[fol. 547] Oscar R. Thorson and M. White A stockholders' meeting of the Bridge Company was held March 10, 1931, which was controlled by the stock of Thompson & Company and John A. Thompson, 1310 shares and proxies held by Thompson 375 shares, a total of 1685 shares out of 2586 shares represented, at which meeting a board of directors was elected controlled by said Thompson. Following said stockholders' meeting, a directors' meeting was held at-

tended only by Thompson directors, viz., V. W. O'Conner, John A. Thompson, A. B. Wilder and Oscar R. Thorson. At this meeting, there was passed a purported resolution providing for the issuance of a $50,000 mortgage to the Phoenix Finance System, Inc. on the properties of the Iowa-Wisconsin Bridge Company which resolution contained the false and fraudulent recital that funds received from sale of stock had been inadequate to properly finance the rapid completion of the bridge; whereas, the Bridge Company ther had nothing to do with the sale of stock and it had delivered to J. W. Shaffer & Company $320,000 of its stock and $10,000. in cash for the completion of the bridge. That pursuant to such resolution a mortgage was executed to Phoenix Finance System, Inc. for $50,000 signed on behalf of the Bridge Company by A. B. Wilder, who was then also an officer and director of said mortgage company. That in truth and in fact no indebtedness of said Bridge Company to the Phoenix Finance System, Inc., existed and the Bridge Company received no consideration for the execution of said mortgage; that the same was and is wholly without consideration, fraudulent and void. At said time said Thompson caused entries to be made on the books of said Bridge Company purporting to show the receipt of $50,000 in cash, whereas, in truth and in fact, said amount and no part thereof was received by the Bridge Company.

[fol. 548] Said Thompson caused entries to be made on the books of the Bridge Company as though the following payments were made, $25,000 on sub-structure, $5000 on grading and $5000 on engineering, when in truth and in fact no such payments were made in any form, and also caused entries to be made on the Bridge Company's books as though the bridge company owed $15,000 to Thompson & Company, wholly owned subsidiary of Phoenix Finance System, Inc., when in truth and in fact there was nothing due from the Bridge Company to Thompson & Company or Phoenix Finance System, Inc., but on the contrary there was due over $3,000 from Thompson & Company to the Bridge Company and the aforesaid entries were wholly false.

That John A. Thompson on November 5, 1930, purchased 65 shares of Bridge Company stock from the Bridge Com-

pany at $100 per share, and on the same day A. B. Wilder, also a director of the Bridge Company, purchased 10 shares of Bridge Company stock from the Bridge Company at $100 per share. That on the 31st day of December, 1930, Thompson & Company purchased 170 shares of Bridge Company stock from the Bridge Company at $100 per share. That subsequent to such purchase of stock by John A. Thompson and A. B. Wilder on the 31st day of December, 1930, the said John A. Thompson, through his dominant control of the Bridge Company, credited to Thompson & Company on the books of the Bridge Company 15% commission on all of the aforesaid stock in the sum of $3,675. That it was the duty of John A. Thompson and A. B. Wilder as directors of the Bridge Company to assist in selling [fol. 549] stock owned by the Bridge Company. That in the selling of said stock no exceptional or extraordinary services were rendered and they were not entitled to credit for said commissions.

That about the 11th of March 1931 John A. Thompson and his affiliated companies, through the dominant control of the Iowa-Wisconsin Bridge Company, caused a payment of $3,000 to be made from the funds of the Bridge Company to A. B. Wilder through the medium of checks issued to John W. Shaffer and immediately endorsed and delivered to A. B. Wilder. and $1000 thereof was then turned over to Thompson & Company by said Wilder. That the said Wilder was then an officer and director of the Phoenix Finance System, Inc., and also a director of the Bridge Company. That no resolution was passed by the stockholders or directors of the Bridge Company authorizing such payments to said Wilder nor was there any action taken or resolution passed by the Bridge Company providing for the payment of any amount to said Wilder for services nor had there been nor were there any exceptional or extraordinary services rendered by said Wilder to the Bridge Company. That no consideration passed to the Bridge Company for such sums. That the said Thompson and his affiliated companies controlling the Bridge Company, so manipulated its books as to cause fictitious entries to be made thereon as though said sums were paid

on approaches, when in fact no work was done on approaches for which said sums or any part thereof was a proper payment. That payment of said amounts was a misappropriation of the Bridge Company's funds.

That on the 1st day of November 1931 John A. Thompson and his affiliated companies through the exercise of dominant control of the bridge Company turned over to [fol. 550] the Bridge Company $5,410.85 of notes taken by Thompson & Company in the sales of bridge company stock owned by Thompson & Company and with which Thompson & Company held as collateral such stock sold by it. That substantially all of said notes were worthless. That said Thompson & Company took or received from the bridge company $5,410.85 for such notes. That in such transaction John A. Thompson acted in a dual capacity as president of the bridge company, and as president of the Phoenix Finance System, Inc., and in the interests of himself and his affiliated companies against the interests of the bridge company and dealt with himself in such transaction. The bridge company at the time of such transaction did not have any surplus from which it could purchase any of its stock.

That through the control of Iowa-Wisconsin Bridge Company as aforesaid, said John A. Thompson and Phoenix Finance System, Inc. (predecessor to Phoenix Finance Corporation) caused a trust deed and $200,000 bond issue to be issued by the Iowa-Wisconsin Bridge Company and that a large amount of bonds of the Iowa-Wisconsin Bridge Company were thus caused to be delivered for purported considerations of said Phoenix Finance System, Inc., but which were without proper consideration.

That on July 7, 1933 a meeting of the board of directors of the bridge company was held at which there were present John A. Thompson, Emory H. English, Oscar R. Thorson, H. T. Wagner, A. B. Wilder, M. K. Thompson and G. W. Huntley, all but one of the members present, G. W. Huntly, being Thompson-Phoenix Finance Corporation controlled directors. At this meeting vice-president Emory H. English and Secretary Thorson reported a purported in- [fol. 551] debtedness to the Phoenix Finance Corporation of $12,110.19 on open account and $5,625 on notes, $9,806.10

of said $12,110.19 being purported interest furnished by Phoenix Finance Corporation on the aforesaid fraudulent bonds held by the Phoenix, which were known to the officers of the Phoenix Finance Corporation to be fraudulent, and $1505.75 being charged to the bridge company for Phoenix Finance Corporation officers and employees, and an item of $650 which was merely a journal entry and which neither the bridge company gained nor lost. During the period the officers of the Phoenix thus purportedly charged the bridge company for salaries of the Phoenix Finance System, Inc., officers and employes, the bridge company was paying for its own toll keepers and was paying Thorson $400 per month as Secretary-Treasurer to take care of its accounts, which did not require much bookeeping and there was no occasion for charging the bridge company with the salaries of the Phoenix Finance System, Inc. officers and employes, because it had ample help of its own.

On motion of Wagner, seconded by Wilder, a resolution was adopted through the Thompson-Phoenix Finance Corporation controlled directors directing the execution of a demand note to the Phoenix for $12,110.19, to cover the purported items contained in said open account and instructing the treasurer to pledge $21,100 of the Class B bridge company bonds as collateral to this note and to two other purported notes, which latter notes are the ones set up in plaintiffs' demand, one for $2000 and one for $3,125, hereinafter further referred to.

At the same time of the purported payment of interest on the purported bonds through an alleged loan of the Phoenix Finance Corporation to the bridge company, John [fol. 552] A. Thompson, Emory H. English and A. B. Wilder were directors and officers of the Phoenix Finance Corporation, and were also officers and directors of the bridge company and controlled its accounts and the debits and credits placed on the books of the bridge company, the actual entries being made by M. Graney, an employee and assistant secretary of the Phoenix Finance Corporation. John A. Thompson and Emory H. English, to carry out a purported transaction as though the payment of interest were made by the bridge company on the 7th day of February 1933 made a deposit for the Phoenix Finance Corporation to the account of the bridge company in the

sum of $6896.00 and on the same date they drew three checks to the Bechtel Trust Company, one No. 189 for $6480, payment of interest; one No. 190 for $15.00 payment of Government tax, and one No. 191 for $401 marked accounts payable, representing the charge of the Bechtel Trust Company, making the aggregate of $6896. These checks on the part of the bridge company were all signed by M. Graney, employee of the Phoenix Finance Corporation. A check for $6480 representing interest, was thereafter remitted to Phoenix Finance Corporation, they being the holders of all the bonds on which interest was paid. On the 10th day of February 1933 though the bridge company was paying interest on the bonds, the said Thompson and Emory H. English deposited to the account of the bridge company, by the Phoenix Finance Corporation, $2,910.00. At the same time a check was written on the account of the Bridge Company in the Iowa-Des Moines National Bank, No. 193, for $2,910.00 to Bechtel Trust Company, being dated February 9th, 1933, payment of interest due January 1st, 1933 on Class A bonds held by Phoenix Finance Corporation. This check was also signed by M. Graney.

[fol. 553] The purported interest payment on bonds was a mere manipulation of Thompson and officers and employees of the Phoenix Finance Corporation while controlling the Bridge Company and its books and accounts for the purpose of making it appear as though the bridge company paid interest on the fraudulent bonds and with the evident purpose of attempting to create a supposed waiver in favor of the Phoenix Finance Corporation of the fraudulent character of the bonds, or an estoppel, to the detriment of the bridge company.

Then there is an item of $109.86, being for claimed balance on the invalid and fraudulent exchange of 517 shares of stock for bonds.

That none of the aforesaid claims were valid claims. That at the time of the purported and pretended execution of each of the two notes set forth in plaintiffs' demand, John A. Thompson—Phoenix Finance Corporation controlled and dominated the Iowa-Wisconsin Bridge Company, its officers and directors, and said John A. Thompson at said

time was president of the Iowa-Wisconsin Bridge Company, and of the Phoenix Finance Corporation, and that both he and other directors of the Phoenix Finance Corporation, who were also directors of the Bridge Company, were acting in a dual capacity against the interests of the bridge company when they caused the execution of said notes if said notes were executed. At the dates of said pretended notes and their claimed execution, the Phoenix Finance Corporation was indebted to the Bridge Company in far greater amount than the amount of said notes. That at that time it was indebted to the bridge company in the sum of $3,000.00, for checks of the bridge company of that amount given to A. B. Wilder at the time of the execution of the fraudulent $50,000 mortgage, without consideration, which $3,000.00 had not been repaid to the bridge company. That [fol. 554] the conspirators, John A. Thompson, Phoenix Finance Corporation and Thompson & Company, were jointly and severally liable therefor, and said notes were offset by the $3,000.00 thus wrongfully appropriated from the bridge company, and disbursed $2,000 to A. B. Wilder and $1,000 check to Thompson & Company, and were further offset by the fact that the Phoenix Finance System, Inc. and its successor, the Phoenix Finance Corporation also owed the bridge company $14,000 with interest thereon from November, 1930, for bridge company stock which it had received fraudulently without consideration, and charged to promotion, through the dominant control of John A. Thompson, and offset by other items due the bridge company from the Phoenix Finance Corporation. That at the date of said purported notes mentioned in plaintiffs' demand, the Phoenix Finance Corporation was indebted to the bridge company in a far greater amount than the amount of said purported notes, and if at that time the Phoenix Finance Corporation made any payment to or put any funds into the account of the bridge company, it was merely a partial payment on what was due the bridge company from the Phoenix Financed Corporation, and did not furnish any basis or consideration for the execution of said purported notes, and said notes are without consideration, which fact was well known to the said John A. Thompson and the Phoenix Finance Corporation; that said purported notes are not under seal, and that said notes were never lawfully executed and delivered.

Fayette D. Kendrick, George C. Dittman, Andrew Gullickson and T. H. Bakewell and Mrs. E. J. Parman.

That stock of the bridge company was sold to certain stockholders on the representations of the Phoenix Finance System, Inc., its subsidiary Thompson & Company and John A. Thompson that the bridge company property was unen- [fol. 555] cumbered, and that untrue statements were made at a stockholders' meeting of the bridge company to carry out the scheme and plan to fraudulently issue the bonds.

Lee McNeely That he is the Clerk of the United States District Court for the Northern District of Iowa; that an action was filed in said court in his office for the Eastern Division entitled Bechtel Trust Company and A. H. Schubert, as trustees versus the Iowa-Wisconsin Bridge Company; that later Fayette D. Kendrick and other stockholders of the defendant bridge company intervened and that the Phoenix Finance Corporation on motion of interveners was made a party co-complainant; that said action was an action for foreclosure of the aforesaid purported trust deed and bonds and to identify the records in said cause and to show that the items involved in the instant case were involved in and adjudicated in said cause in the Federal Court against the Phoenix Finance Corporation.

That this affiant is informed and believes that the statements contained in the foregoing affidavit are true and states that insofar as they relate to any act or deed of this affiant they are true.

IRENE M. BELL

Subscribed and sworn to before me by the said Irene M. Bell this 29th day of April, A. D. 1939.

Notarial Seal

F. T. BARRETT,
Notary Public in and for
Cerro Gordo County, Iowa.

My commission expires July 4, 1939.

[fol. 556] In the Superior Court of the State of Delaware
In and For New Castle County.

November Term, A. D. 1938.

Summons Case.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 39. vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

May 19, 1939. Continued to November Term.

May 20, 1939. Replaced on trial list.

June 15, 1939. Heard by the Court without the intervention of a Jury. Briefs to be submitted.

June 30, 1939. Stipulation by and between attorneys for the plaintiff and the defendant for the correction of Defendant's Exhibit #5 filed.

[fol. 557] In the Superior Court of the State of Delaware
In and For New Castle County.

November Term, 1938.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 39. vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

It Is Stipulated and Agreed by and between James R. Morford, one of the attorneys for the plaintiff, and Daniel F. Wolcott, one of the attorneys for the defendant in the above stated cause, that Defendant's Exhibit No. 5 offered in evidence in said cause be corrected in the following respects:

1. Page 177, line 20—change the word "charged" to "pledged."

2. Page 182, line 10—omit word "only."

3. Page 183, line 22, and p. 184, line 5—change "minute book No. 2" to "minute book No. 3."

4. Page 188, line 17—change word "appropriation" to "proportion."

5. Page 203, line 20—change word "received" to "made."

6. Page 230, line 1—change "$2,549.36" to "$5,549.36."

7. Page 235, line 22—change "Shaffer & Company" to "Bridge Company."

[fol. 558] It Is Further Stipulated that with the approval of the Court, said corrections may be made physically upon defendant's Exhibit No. 5 by the Court Stenographer.

The foregoing stipulation is without prejudice to the objections of the attorney for the plaintiff to the admission of said Exhibit, as the same appear of record and without prejudice to the plaintiff's pending motion to strike the same.

JAMES R. MORFORD,
Attorney for Plaintiff.

DANIEL F. WOLCOTT,
Attorney for Defendant.

Dated June 30, 1939.

[fol. 559] (Exhibit SC-102.)

Bill of Complaint.

February 18, A. D. 1939—Bill of Complaint filed, which said bill is in words and figures as follows:

To the Chancellor of the State of Delaware:

Humbly complaining, showeth unto your Honor, your Orator, Phoenix Finance Corporation, as follows:

1. That your Orator, Phoenix Finance Corporation, is a corporation duly organized and existing under the laws

of the State of Delaware, having been incorporated on the 29th day of December, 1931, and having its principal place of business within the State of Delaware at 900 Market Street, City of Wilmington, State of Delaware.

2. That the respondent, Iowa-Wisconsin Bridge Company, is a corporation duly organized and existing under the laws of the State of Delaware, having been organized as Lansing Bridge Company on the 20th day of March, A. D. 1928, and thereafter, on the 11th day of June, A. D. 1928, having changed its name to Iowa-Wisconsin Bridge Company by an amendment to its certificate of incorporation. Said corporation has its principal place of business within the State of Delaware at 100 West Tenth Street, Wilmington, Delaware.

3. That said respondent has an authorized capital stock consisting of 3,750 Class A shares of the par value of $100, and 3,750 Class B shares without par value. Said Class A shares are without voting rights, except as expressly conferred by statute, while said Class B shares have the sole right to elect directors for said corporation. At the present time, 3,632 shares of the Class A stock and 3,637 shares of the Class B stock are issued and outstanding and are held by numerous stockholders. The respondent holds as treasury stock 38 shares of the Class A and 90 shares of the Class B stock.

4. That on or about the 1st day of November, A. D. 1931, [fol. 560] the respondent issued a certificate for 517 shares of its Class A stock, which certificate was numbered N1220, dated November 1, 1931, and was issued in the name of Phoenix Finance System, Inc. Said 517 shares, when issued as aforesaid to Phoenix Finance System, Inc., were fully paid for and non-assessable, and said Phoenix Finance System, Inc., became the holder of record of said number of shares represented by said certificate. Phoenix Finance System, Inc., as of January 1, 1932, sold, transferred and assigned for a valuable consideration said 517 shares and the certificate representing the same unto your Orator, Phoenix Finance Corporation, and as of March 15, 1932, your Orator, Phoenix Finance Corporation, was the owner of 517 shares of the Class A stock of the respondent and held certificate #N1220 above mentioned which had been

transferred and endorsed to its as evidence of its ownership of said stock.

5. That on the 15th day of March, A. D. 1932, your Orator transferred and assigned said 517 shares and said certificate #N1220 to the respondent, Iowa-Wisconsin Bridge Company, in exchange for the issuance and delivery unto it by said respondent of $60,390.14 in principal amount of respondent's First Mortgage Gold Bonds, 6%, dated February 1, 1932, issued under a Deed of Trust dated January 1, 1932, between Iowa-Wisconsin Bridge Company and Bechtel Trust Company, as Trustee. Said bonds were issued in the form of bearer bonds. At said time your Orator also gave Iowa-Wisconsin Bridge Company a credit of $109.86 so that a total of $60,500 in principal amount of said bonds could be issued unto it.

6. The form of said exchange was that of a purchase from your Orator by said Iowa-Wisconsin Bridge Company of said 517 shares of its Class A stock and the consideration for said purchase was the issuance and delivery unto your Orator of the bonds of Iowa-Wisconsin Bridge Company as aforesaid.

7. That on the 15th day of March, A. D. 1932, when said purported purchase and sale took place as aforesaid, where- [fol. 561] by your Orator sought to sell and the respondent sought to purchase 517 shares of the Class B stock of the respondent from your Orator in consideration of the issuance of said bonds of the respondent, there was an impairment of the capital of said respondent and by virtue of said attempted purchase and sale the capital of the respondent was further impaired.

8. Your Orator has been advised and informed and believes and therefore avers that under and pursuant to the provisions of Section 19 of the Delaware Corporation Law the sale by it as aforesaid of said 517 shares of the Class A stock of respondent to the respondent in consideration of the issuance and delivery by the respondent to your Orator of said bonds as aforesaid, was invalid and void. Your Orator further says that said respondent, Iowa-Wisconsin Bridge Company, has refused to recognize said purchase and sale as having been a valid transaction and has refused

to recognize that said bonds held by your Orator are valid and enforceable obligations of said respondent.

9. The respondent made two semi-annual payments of interest upon said bonds, namely, on August 1, 1932, and on February 1, 1933, but has made no further or other payments of interest to your Orator and has refused to pay to your Orator the principal amount with interest now due and payable upon said bonds. The sums received by your Orator for said two semi-annual interest payments came from funds which your Orator advanced unto the respondent and which have not been repaid unto your Orator.

10. Your Orator says that by virtue of said attempted purchase and sale having been invalid and void, it has at all times continued as a stockholder owning said 517 shares of the Class A stock of the respondent. After your Orator transferred and delivered said certificate #N1220 to the respondent, the respondent caused the same to be cancelled and issued in place thereof certificate #N1239 dated March 15, 1932, for said 517 shares of the Class A Stock [fol. 562] and issued the same in the name of the respondent, and thereafter retained the same and still holds the same as treasury stock.

11. Your Orator has made a demand upon the respondent for the delivery unto your Orator of a certificate for said 517 shares, but the respondent has refused to deliver a certificate for said number of shares unto your Orator or to register your Orator on its books as the owner of said 517 shares.

12. Your Orator hereby offers to bring into Court and surrender for delivery to the respondent $60,390.14 in principal amount of respondent's First Mortgage Gold Bonds, 6%, dated February 1, 1932, issued by Iowa-Wisconsin Bridge Company as aforesaid, upon said respondent registering it as the holder of said 517 shares upon the books of respondent and issuing unto it a certificate for said 517 shares.

Wherefore, your orator prays as follows:

(1) That a subpoena may issue directed to said respondent requiring it to appear and answer this bill of complaint.

(2) That a decree be entered herein directing the respondent to register your Orator, Phoenix Finance Corporation, upon its books and records as the owner of the 517 shares of the Class A stock of the respondent above mentioned and to issue and deliver unto your Orator a certificate for said shares.

(3) That your Orator may have such further and other relief as the nature of the case may require and to your Honor may seem equitable and proper.

PHOENIX FINANCE CORPORATION,
By Dee E. Renshaw, Vice-President,
(Corporate Seal)

Attest: DEE E. RENSHAW, Vice-Pres.

ARTHUR G. LOGAN,
MARVEL, MORFORD & LOGAN,
Solicitors for Complainant.

State of Florida,
County of St. Lucie.—ss.:

Be It Remembered that on this 30th day of September, A. D. 1938, personally appeared before me, the subscriber, [fol. 563] a Notary Public for the State and County aforesaid, Dee E. Renshaw, who being by me first duly sworn according to law, did depose and say:

That he is Vice-President of Phoenix Finance Corporation, the complainant named in the foregoing bill of complaint; that he has read the foregoing bill of complaint and knows the contents thereof; that what is set forth in said bill of complaint, so far as the same relates to his own act and deed, or to the act and deed of said complainant, is true, and so far as the same relates to the act and deed of any other person or persons he believes the same to be true; that he has executed the foregoing bill of complaint on behalf of the corporation pursuant to authority of the Board of Directors.

DEE E. RENSHAW.

Sworn to and subscribed before me the day and year aforesaid.

E. S. WILLES, Notary Public,
Notary Public, State of
Florida at Large.

(Notarial Seal)

My Commission Expires Jan. 15, 1939.

February 20, A. D. 1939—Subpoena issued and delivered to the Sheriff of New Castle County for service; the said Sheriff subsequently returning the same, marked as follows:

"Summoned Iowa-Wisconsin Bridge Company, a corporation of the State of Delaware, by serving the within writ and delivering a copy thereof personally to Alfred Jervis, Secretary of Corporation Trust Company, Corporate resident agent for said Iowa-Wisconsin Bridge Company, a corporation as aforesaid, February 20th, 1939.

So. Ans. SAMUEL M. FORD,
Sheriff."

February 25, A. D. 1939—Iowa-Wisconsin Bridge Company appears thru its solicitor Daniel F. Wolcott, Esquire.

March 9, A. D. 1939—Motion for extension of time for answer, etc. filed, which said motion reads as follows:

Now, comes Iowa-Wisconsin Bridge Company, the above named defendant, by Daniel F. Wolcott, its solicitor, and moves the Court that the time within which the said defendant must plead answer or demurrer to the Bill of Complaint filed herein be extended to and including the 23rd day of March, A. D. 1939.

DANIEL F. WOLCOTT,
Solicitor for Defendant.

[fol. 564] Upon which motion the following order was made by the Chancellor:

And Now, to-wit, this 9th day of March, A. D. 1939, the foregoing application of Iowa-Wisconsin Bridge Company,

having been presented to and considered by the Court upon motion of Daniel F. Wolcott, Solicitor for the defendant,

It Is Ordered that the time within which the Iowa-Wisconsin Bridge Company, the defendant herein, must plead answer or demurrer to the Bill of Complaint filed herein, is extended to and including the 23rd day of March, A. D. 1939.

W. W. HARRINGTON,
Chancellor.

March 20, 1939—Answer filed, which said answer is in words and figures as follows, to-wit:

To the Chancellor of the State of Delaware:

In answer to petitioner's complaint, the respondent states:

I. Respondent admits that Phoenix Finance Corporation is incorporated under the laws of Delaware, but states that as to when it was incorporated it has neither knowledge nor information sufficient to form a belief and therefore asks that complainant be required to make strict proof thereof.

II. Respondent admits paragraph two of the complaint.

III. Answering paragraph three of the complaint the respondent admits that the authorized capital stock of the Iowa-Wisconsin Bridge Company is as alleged, and that the voting rights are as alleged, and that the outstanding stock is held by numerous stockholders, but denies the other allegations of said paragraph and respondent alleges that, as shown by the stock ledger of the Iowa-Wisconsin Bridge Company, there is outstanding 3663 shares of Class B stock of which 90 shares are in the treasury of the Iowa-Wisconsin Bridge Company issued to it, and 3670½ shares of Class A stock of which 555½ shares are in the treasury issued to the Iowa-Wisconsin Bridge Company.

IV. Answering paragraphs four, five, six and seven, [fol. 565] the respondent denies the allegations thereof and further answering said paragraphs states:

(a) That the Articles of Incorporation of the Iowa-Wisconsin Bridge Company at the times hereinafter mentioned contained the following provisions with respect to the stock, to-wit:

"The total number of shares of stock which the corporation shall have authority to issue is 7500, of which 3750 shares of the par value of $100 each, amounting in the aggregate to #375,000 shall be Class A stock, and of which 3750 shares without par value shall be Class B stock. Class B stock may be issued from time to time for such consideration as may be fixed by the Board of Directors.

"A statement of the designations, powers preferences and rights, and the qualifications, limitations of restrictions thereof, in respect of the Class A stock and Class B stock, are as follows:

"The holders of Class A stock shall be entitled to receive, when and as declared by the Board of Directors of the corporation out of the net assets in excess of capital or net profits as permitted by law, preferential dividends at the rate of $6.00 per annum, and no more, except as hereinafter provided, which said dividends shall be payable annually, semi-annually, or quarterly, on such days as may be determined by the Board of Directors, before any dividend shall be declared or paid upon, or set apart for, Class B stock. Such dividends upon Class A stock shall be cumulative.

"Whenever the dividend above provided for upon the Class A stock shall have been paid or declared, or a sum sufficient for the payment thereof set apart, dividends may be declared by the Board of Directors out of the remainder of the net assets in excess of capital or from net profits available for dividends, in the following manner: Class B stock shall receive a dividend of $6.00 on each share, and thereafter Class A stock and Class B stock shall participate alike in the maximum amount of $4.00 per share, making a total aggregate amount to which the Class A stock might become entitled of $10.00 per share.

"Whenever the dividends above provided for shall have been paid or declared, or a sum sufficient for the payment thereof set apart, further dividends upon the Class B stock

may be declared by the Board of Directors out of the remainder of the net assets in excess of capital or from net profits available for dividends, and the holders of Class A stock shall not be entitled to participate in any of such dividends. All dividends on Class B stock and all dividends on Class A stock, except the initial $6.00 per share on the Class (....) stock shall be non-cumulative.

"The Class A stock may be redeemed, in whole or in part, on any dividend date at the option of the corporation, to be exercised by its Board of Directors, at $105.00 per share, plus all accrued dividends.

[fol. 566] "If less than all shares of Class A stock are to be redeemed, the shares to be redeemed shall be selected by lot or pro rata, as the Board of Directors shall determine. Notice of the intention of the corporation to redeem shares of Class A stock shall be mailed at least thirty (30) days before the date of redemption to each holder of record of the shares to be redeemed at his last known address as shown by the corporation's records. At any time after such notice has been mailed as aforesaid, the corporation may deposit the aggregate redemption price with any bank or trust company in the City of Lansing, Iowa, named in such notice, payable in the amounts aforesaid to the respective holders of the shares so to be redeemed, on endorsement and surrender of their certificates, and thereupon such holders shall cease to be stockholders with respect to said shares, and from and after the making of such deposit said holders shall have no interest in or claim against the corporation with respect to such shares and shall be entitled only to receive said moneys from said bank or trust company without interest. The corporation may also purchase shares for redemption at not exceeding the redemption price above specified.

"Any Class A stock redeemed or purchased for redemption under any provision hereof, or otherwise, shall be cancelled and not reissued.

"In the event of the dissolution, liquidation, or winding up of the corporation, whether voluntary or involuntary, the holders of Class A stock shall be entitled to receive and be paid $105.00 a share, before any distribution is made

to the holders of Class B stock, but shall not be entitled to share further in the assets of the corporation or the proceeds of liquidation. The remaining assets or proceeds of liquidation shall be distributed among the holders of Class B stock.

"The holders of the Class A stock as such, shall have no right whatsoever to any stock dividends which may be declared or to subscribe for any new issue of stock or increased stock of whatever class, or securities convertible into stock, or warrants, or rights to purchase stock which may now or hereafter be authorized or issued.

"So long as any of the Class A stock shall be outstanding, the corporation shall not (except for the purpose of redeeming all of the Class A stock) unless with the affirmative vote or written consent of the holders of at least two-thirds in amount of the then outstanding Class A stock:

"(a) Consolidate with any other corporation, or sell, lease, exchange, or otherwise dispose of all, or substantially all, of the property and business of the corporation; provided, however, that the corporation may consolidate with any other corporation, or sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property and business without the vote or written consent of the holders of two-thirds in amount of the outstanding Class A stock, by paying to the holders of the Class A stock who shall not vote in favor of any such transaction, or who shall not consent thereto, the sum of $105.00 per share.

"(b) Increase the authorized amount of Class A stock or create any stock (or security convertible into stock) having any preference or priority over or equality with Class A stock.

[fol. 567] "(c) Guarantee the payment of obligations or stock of other corporations (except obligations of subsidiary corporations incurred in the usual course of business).

"(d) Alter, amend or repeal any of the provisions of the Certificate of Incorporation which are protective of the Class A stock.

"The holders of the Class A stock shall have [not] voting power, nor shall they participate in the management and control of the corporation, all voting rights being vested exclusively in the holders of Class B stock, nor shall the holders of the Class A stock be entitled to notice of meetings of stockholders except as may be otherwise provided by the laws of the State of Delaware."

(b) That the Iowa-Wisconsin Bridge Company owns an interstate bridge over the Mississippi River at Lansing, Iowa, between Lansing, Iowa and DeSoto, Wisconsin.

(c) That on or about November 1930 and at the times hereinafter mentioned John A. Thompson, A. B. Wilder, Emory H. English and others associated with them obtained the control of and dominated the Iowa-Wisconsin Bridge Company and its board of directors.

(d) That on or about the month of November 1930 and at all times hereinafter mentioned John A. Thompson, A. B. Wilder, Emory H. English and those associated with them, owned the majority of the capital stock of and controlled the Phoenix Finance System, Inc., a Delaware corporation, and its board of directors, and its subsidiary, Thompson & Company, a Delaware corporation.

(e) That the said Thompson fraudulently conspired with others, who were officers and directors of the bridge company and also officers and directors of the Phoenix Finance System, Inc., and planned and schemed to acquire the ownership of the property of the bridge company to the exclusion of the bridge company and its stockholders.

(f) That in October 1930 the grading and sub-structure of the interstate bridge of the Iowa-Wisconsin Bridge Company were nearly completed. The work had been financed through the sale of bridge company stock. No contract had been let for the erection of the super-structure. On November 11, 1930 a contract was executed be- [fol. 568] tween John W. Shaffer & Co. by John W. Shaffer, President, and Iowa-Wisconsin Bridge Company, by John A. Thompson, its president, by the terms of which John W. Shaffer and Company agreed to furnish the material and complete the super-structure of the bridge for $10,000 cash and 3200 shares of the capital stock of the

Iowa-Wisconsin Bridge Company, with a provision for extras, which were required to be ordered in writing; the work was to proceed with sufficient dispatch that the bridge would be open for traffic by March 10th, 1931. The contractor agreed to furnish a surety bond at the expense of the owner. Subsequently, Thompson waived the giving of the surety bond. John W. Shaffer and Company sublet the contract for the steel to McClintic Marshall and Company, the construction work to the Industrial Contracting Company.

(g) In November 1930, immediately after the issuance of said 3200 shares of stock to Shaffer & Company, the latter company sold said stock to Thompson & Company and received the promissory note of Thompson & Company for $224,000.00 therefor, said Thompson & Company being a wholly owned subsidiary of Phoenix Finance System, Inc.

(h) That on or about the 10th day of November 1930 the said Thompson dominating and controlling the bridge company caused 140 shares of its capital stock to be issued to the Phoenix Finance System, Inc. without lawful consideration, and actually sold by it prior to November 9th.

(i) That on or about February 5th, 1931 the said Thompson engaged Elliott-Rodgerson & Co., Minneapolis, Minnesota, brokers to sell stock purchased by Thompson & Company from Shaffer & Company, and personally and on behalf of Phoenix Finance System, Inc. represented and assured said brokers that $750,000.00 would be the entire capitalization of the bridge company and that no mortgage would be placed upon the bridge and no bonds would be issued; that relying on these representations which were passed to the public, Elliott-Rodgerson & Co. sold to [fol. 569] the public about $100,000.00 worth of bridge company stock at $100 per share; and that the stock was purchased by present stockholders of the bridge company on said basis relying on said representations.

(j) In March 1931 said Thompson and Phoenix Finance System, Inc., dominating and controlling the bridge company and its directors, so manipulated the affairs of the bridge company that a purported resolution was passed at directors' meeting of the bridge company, providing for

the issuance of a $50,000 mortgage to the Phoenix Finance System, Inc. on the properties of the Iowa-Wisconsin Bridge Company, which resolution contained the false and fraudulent recital, that funds received from sale of stock had been inadequate to properly finance the rapid completion of the bridge. Whereas, the bridge company then had nothing to do with the sale of stock and it had delivered to John W. Shaffer & Company $320,000.00 of its stock and $10,000.00 in cash for the completion of the bridge. That pursuant to such resolution the mortgage was executed to the Phoenix Finance System, Inc. for $50.000.00 signed on behalf of the bridge company by A. B. Wilder, who was then also an officer and director of the Phoenix Finance System, Inc.; that in truth and in fact no indebtedness of the said bridge company to the said Phoenix Finance System, Inc. existed and the said mortgage was without consideration; that at said time said Thompson caused to be made entries on the books of the bridge company, purporting to show the receipt of $50,000.00 in cash, whereas, in truth and in fact, said amount nor no part thereof was received by the bridge company; that the said Thompson caused entries to be made on the books of the bridge company as though the following payments were made; $25,000 on sub-structure; $5000.00 on grading; $5000.00 on engineering, when in truth and in fact no such payments were made in any form, and also caused entries to be made on the bridge company's books as though the bridge company owed $15,000.00 to Thompson [fol. 570] & Company, wholly owned subsidiary of the Phoenix Finance System, Inc., when in truth and in fact, there was nothing due from the bridge company to Thompson & Company or the Phoenix Finance System, Inc., but on the contrary there was due over $3000.00 from Thompson & Company to the bridge company, and the aforesaid entries were false. Checks of $35,000 and $10,000 were drawn by the Phoenix Finance System, Inc., endorsed and returned to the account of the Phoenix Finance System, Inc.

(k) That on August 6th 1931 John W. Shaffer & Company owed Industrial Contracting Company $10,000.00; McClintic-Marshall Company $11,262.71; Kramer & Hogg, amount then in dispute; that Shaffer & Company also

claimed to be entitled to payment for certain extras, labor, materials and commission; that there were also matters in dispute between the bridge company and Shaffer & Company with reference to the bridge contracts; that to make a complete settlement, a stated settlement contract was made on August 6th 1931 between the bridge company, as [part] of the first part, and John W. Shaffer, Vernon W. O'Connor, John W. Shaffer & Company and Standard Shares Holding Company, as parties of the second part, which was executed on behalf of the bridge company by John A. Thompson as president and which provided:

"That the bridge company transferred to the other parties to the contract 120 shares of its common stock and 80 shares of its preferred stock and certain other securities which were of the value of $2475.00, and to pay Kramer & Hogg the balance due them. That the second parties (Shaffer, O'Connor, Standard Shares Holding Company and Shaffer & Company) accept such consideration as full and complete settlement of all sums due them and/or any of them, and full satisfaction and stated settlement of any and all claims of all kinds, whatsoever arising out of any contract or other considerations between the parties hereto and/or pertaining in any way to said toll bridge and second parties separately and jointly hereby release said Iowa-Wisconsin Bridge Company fully and completely. Second parties hereby specially acknowledge receipt of full payment of all engineering, designing and building of said bridge and for all materials, services and all other things pertaining to said bridge."

That the Iowa-Wisconsin Bridge Company, pursuant to this contract delivered 200 shares of its stock of the par value of $20,000. and other securities of the value of $2475.00; that about the same time John W. Shaffer agreed to and did turn over to Thompson of Thompson & Com- [fol. 571] pany and president of the Phoenix Finance System, Inc. $10,000 of the bridge company stock (100 shares received by Shaffer) and Thompson & Company and Thompson, president of Phoenix Finance System, Inc., agreed to pay the $10,000 owing by Shaffer & Company to the Industrial Contract Company and the $11,262.71 owing by Shaffer & Company to McClintic Marshall & Company.

That neither the Industrial Contracting Company nor the McClintic Marshall Company had any contract with the bridge company nor was the bridge company indebted to them in any way.

(l) That on the 10th day of November 1931 at a so-called re-convened meeting of the board of directors of the bridge company, controlled by said Thompson-Phoenix Finance System, Inc., and at said meeting, as a part of the fraudulent scheme, plan and conspiracy, it was represented by said Thompson that the bridge company owed the following items:

Phoenix Finance System, Inc. note secured by mortgage for $50,000.00 and interest;

Claim of McClintic Marshall & Company, steel $12,000.00;

Claims Phoenix Finance System, Inc. for money advanced to Industrial Contracting Company for labor and materials, $10,000.00; and

Other obligations aggregating $40,000.00.

That at this meeting resolutions were adopted providing for a bond issue of $200,000.00, for a stockholders meeting to consider the bond issue; for the delivery of the bonds to pay the $50,000 mortgage and for the payment of other alleged claims.

(m) That on the 11th day of November 1931 a letter prepared at the dictation of John A. Thompson and signed by Oscar R. Thorson, Secretary-Treasurer of the bridge company, under said Thompson's direction, was sent to the stockholders of the said bridge company; that in this letter it was falsely and fraudulently represented to the stockholders of the bridge company, for the purpose of inducing them to approve the proposed bond issue of $200,000.00 and forward proxies to aid Thompson and his associates, as follows:

[fol. 572] (1) "That in October 1930 negotiations were opened with Phoenix Finance System, Inc. to lend its aid in arranging for the financing of the completion of the bridge and to save the project from absolute failure."

That said statement was false in that no request was made of the Phoenix Finance System, Inc. to aid in arranging for financing of the completion of the bridge and that such aid was not necessary to save the project from absolute failure.

(2) "Phoenix Finance System, Inc. entered into an agreement with the bridge company and John W. Shaffer and Company, contractors, on November 10, 1930, under the terms of which Phoenix Finance System, Inc. agreed to guarantee payment to the steel company, which was furnishing the steel for the bridge, and to Industrial Contracting Company, contractors, with the understanding that the Phoenix would be repaid by the bridge company, on demand, for any such advances that might be required to be made by it temporarily in order to fulfill the guarantee and to permit the continuation of work on the bridge."

That these statements were false, and that the Phoenix Finance System, Inc., had represented in a letter to Elliott-Rodgerson & Company under date, February 5th, 1931: "The Phoenix Finance System, Inc. of Des Moines, Iowa has unconditionally guaranteed the payments on the steel as purchased from McClintic Marshall Company, Chicago, Illinois, the same being all of the steel required in the construction of the Blackhawk bridge, also further guaranteeing all the payments for the Industrial Contracting Company of the erection of said steel, and all details in connection with it and outside investors have the further assurance of the completion in the fact that the Phoenix Finance System, Inc. has unconditionally guaranteed to pay for the completion of this bridge." And in that it was not disclosed that the Phoenix Finance System, Inc. had received $14,000.00 of bridge company stock without proper legal consideration.

(3) "The sale of stock to the public showed no improvement and in order that the work on the bridge might not be delayed, Phoenix Finance System, Inc. made [substantially] advances."

These statements were false in the following respects: The sale of stock to the public was a matter of no interest to [fol. 573] the bridge company. It had fully paid for the

completion of the bridge and the sale of stock was entirely a private matter of Thompson & Company, the purchasers of the stock from Shaffer & Company. There were no advances made by Phoenix Finance System, Inc. in order that the work on the bridge might not be delayed. Even the claimed payment to Industrial Contracting Company was made after the Industrial Contracting Company had completed the work on the super-structure, and was made on an obligation not owed by the bridge company.

(4) "The construction of the bridge went forward without delay and the cash required for material and labor was advanced regularly by the Phoenix Company".

That this statement was false in that the money paid for material and labor was paid by John W. Shaffer & Company from sums that were due it from Thompson & Company on the $224,000.00 note.

'(5) There has been advanced by the Phoenix Finance System, Inc. to the bridge company in the payment of bills for labor and material to complete the bridge, approximately $70,000.00, $50,000.00 of which is secured by mortgage, which was due September 10, 1931."

This statement was false and fraudulent in that there was no valid mortgage of $50,000 held by the Phoenix Finance System, Inc.; that neither $50,000.00 nor any other sum was advanced or paid by the Phoenix Finance System, Inc. for the benefit of the bridge company at the time of the execution of the mortgage or at any other time. That no sums had been advanced by the Phoenix Finance System, Inc. in the payment of bills for labor and materials to complete the bridge owed by the Iowa-Wisconsin Bridge Company.

(6) "In addition to the $70,000 which has been advanced by the Phoenix Finance System, Inc. there will be immediately required the further sum of $50000 to complete the payment of outstanding obligations."

This statement was false, fraudulent and untrue, because under the terms of the settlement agreement with Shaffer, a complete settlement had been made for all obligations of the bridge company, save the amount due Kramer &

[fol. 574] Hogg, and Shaffer & Company had been paid therefor the sum of $22,475.00 in stock and securities.

(7) "The board of directors was confronted with the problem of raising additional funds with which to satisfy the claims of Kramer & Hogg and McClintic-Marshall & Company in order to prevent threatened liens and litigation to collect these amounts."

That this statement was false and fraudulent in that there was no obligation on the part of the bridge company to pay the claim of McClintic Marshall & Company in view of the settlement made with Shaffer & Company. The Phoenix Finance System, Inc. had guaranteed the payment of the McClintic Marshall & Company sub-contract, had the primary obligation of Shaffer & Company to pay the claim, and through its president, John A. Thompson, in consideration of 100 shares of bridge company stock, received from Shaffer & Company, had released and discharged Shaffer & Company from such payment and assumed the same, and the bridge company was not liable for the obligation.

(8) "It was never intended that this cash advance by the Phoenix Finance System, Inc. to the bridge company should be of a permanent nature and it must now be repaid."

That this statement was false and fraudulent in that cash had not been advanced by the Phoenix Finance System, Inc. to the bridge company.

(n) That following the aforesaid letter, a notice of a proposed stockholders meeting for December 22, 1931 with form of proxy running to Emory H. English, Oscar R. Thorson, J. H. Thompson, enclosed on stationery of and with postage furnished by the bridge company, was sent to the Class B stockholders, voting stockholders. The fraudulent statements contained in the letter of November 11, 1931 were not corrected, nor was any true information given with respect thereto. The notice called for a special meeting of holders of Class B voting common stock to consider and authorize the directors to borrow, not to exceed $200,000.00; to authorize the issuance of mortgage bonds, not to exceed that amount, and to provide the terms

[fol. 575] and conditions under which such bonds should be issued; to authorize the directors to convey to a named trustee by mortgage deed of trust all of the property and assets of the company to secure the payment of principal and interest of such bonds; to authorize the directors to sell, pledge or otherwise dispose of such bonds and to apply the proceeds thereof to such corporate purposes as the board might from time to time determine. That in response to the letter of November 11, 1931 and the notice of November 20, 1931 the proxies of stockholders were procured, reading to Oscar R. Thorson, Emory H. English and J. H. Thompson, Emory H. English and Oscar R. Thorson being the controlled representatives of John A. Thompson. These proxies voted by Thorson in unison with the stock and proxies held by John A. Thompson, controlled and dominated the stockholders' meeting held on December 22, 1931, as a part of the scheme, plan and conspiracy, and at this meeting there was adopted a resolution authorizing the issuance of first mortgage bonds in the aggregate sum of $200,000.00, and the conveyance by mortgage deed of trust on all the property of the bridge company to secure the payment of such bonds. The resolutions relating to the bond issue was voted and carried by the votes of said John A. Thompson and his controlled associates. The resolution as presented at the meeting contained the following false preambles and representations advanced as reasons for voting in favor of the bond issue.

(1) "Whereas, it was originally contemplated that the funds necessary to construct the Blackhawk Bridge would be acquired through the sale of capital stock, and whereas, a substantial amount of funds were acquired in that manner, but due to a change in general economic conditions it developed that it was impossible to realize sufficient funds from that source as rapidly as the same were required to complete the bridge project economically."

That this statement was false. The bridge company had paid Shaffer & Company $10,000 in cash and delivered $320,000 of its stock for the completion of the bridge; this stock had been sold by Shaffer & Company to Thompson & Company, and the bridge company was not concerned

in its sale. These facts were concealed from the stockholders.

[fol. 576] (2) "Whereas, it was necessary for the company to borrow funds to expedite the completion of said bridge, and avoid disaster, and whereas, the amount of stock required and the cost of building that bridge was greatly in excess of the cash originally estimated."

That these statements were false in that the bridge company had made arrangements with Shaffer & Company for the building of the bridge as above stated. The cost of steel and of building the bridge was not greatly in excess of the amount originally estimated, the contract of Industrial Contracting Company running about $7,000.00 below its original estimate, while the sub-structure contract between John W. Shaffer & Company and McClintic Marshall Company ran about $10,000 more than the amount estimated between those two companies. That the statements were further false in view of the settlement contract which had been made in August, whereby John W. Shaffer & Company received $20,000.00 of bridge company stock and $2475.00 of other securities of the bridge company in full satisfaction and payment of all such extras; that this fact was fraudulently concealed from the stockholders present at the meeting. The Statement was further false and fraudulent because not only was it not necessary for the bridge company to borrow funds to expedite the completion of said bridge and to avoid disaster, but in fact the bridge company had not borrowed any funds from any source.

(3) "Whereas, there still remains unsold capital stock of the bridge company in the approximate amount of $120,000."

This statement was false in that the bridge company did not have remaining in the treasury such amount of stock.

(4) "Whereas, it now becomes necessary for the company to raise sufficient funds with which to repay loans made to the Company by Phoenix Finance System, Inc., a greater portion of which is secured by mortgage on the property of the company, and which is now past due."

This statement was false and fraudulent and made with fraudulent intent, in that the Phoenix Finance System, Inc. did not hold a bona-fide mortgage on the property of the bridge company and had not made any loans or advanced funds to pay obligations of the bridge company and in that [fol. 577] the bridge company did not owe the Industrial Contracting Company nor McClintic-Marshall & Company any amount paid to them by the Phoenix Finance System, Inc., its subsidiary, Thompson & Company, and John A. Thompson to make the payments.

(5) "Whereas, the company for these and other corporate purpose will be presently required to borrow not exceeding $100,000.00 to discharge these obligations and others which it is contemplated will presently arise."

This statement was false and fraudulent in that the company did not owe obligations which required it to borrow any such amount.

(6) "Whereas, it is anticipated that additional funds not to exceed $100,000.00 may from time to time be required to discharge present or future obligations of the bridge company to provide for the payment of pavement and improvements of the dike and to care for flood conditions and other emergencies."

That this statement was false, fraudulent and untrue. The bridge had already been completed and no such sum was needed for dikes or other emergencies, nor was there any intention on the part of said Thompson or his associates to make any such use, as was promptly illustrated by their fraudulent exchange of bonds for the stock held by the Phoenix Finance System, Inc., as hereinafter alleged.

(7) Whereas, the company finds itself unable to acquire funds for these purposes except through the creation and issuance of bonds secured by mortgage deed of trust covering the assets, property and income of the property, and whereas the interests of the stockholders will be jeopardized unless such funds or a part thereof are made available within a reasonable time."

That such statements were false and fraudulent, in that the company did not owe obligations for which it needed any

such funds. That said meeting was wholly controlled and dominated by John A. Thompson and his associates, officers and directors of the Phoenix Finance System, Inc.; that other stockholders relying on the false and fraudulent statements contained in the letter and notice, and believing them to be true, sent proxies as forwarded by Thompson and Thorson, and some minority stockholders voted against said resolution. That independent stockholders at the meeting relying on the false representations hereinbefore quoted, believing them to be true and not knowing the true [fol. 578] facts, voted for the resolutions, and did so because of the fraudulent representations and concealments.

(o) That on December 22, 1931, immediately following such special meeting of the voting common stockholders of the corporation, a directors meeting was held, dominated and controlled by John A. Thompson, at which meeting a purported resolution was passed with respect to the $50,000.00 mortgage, and with reference to the issuance of bonds therefor, and at said meeting it was represented and claimed by said John A. Thompson that it was a valid and bona fide mortgage; that the said John A. Thompson did not disclose the fact that the alleged mortgage was not based on proper considerations and that the same was fraudulent. Such independent directors as were present, voted for the resolution in ignorance of the true facts with reference to the mortgage. That the resolutions of the meeting of the board held on November 10, 1931, were purportedly ratified, and the officers were directed and authorized and empowered to take any action necessary to carry them out, and the officers specifically directed to execute the mortgage deed of trust, which was presented at the meeting.

(p) That on January 5, 1932, a directors meeting of the Iowa-Wisconsin Bridge Company was held, at which were present four Thompson-controlled directors, Emory H. English, Oscar R. Thorson, A. B. Wilder and M. White, and no others. At this meeting these four directors, two of whom were officers, and one a director of the Phoenix Finance System, Inc., passed a resolution to purchase from the Phoenix Finance System, Inc., 517 shares of Class A preferred stock for $51,700.00 with interest from January

1st, 1931, and to deliver Class B bonds of the bridge company in such face amount as would on the basis of 8% yield $51,700 in interest, or $60,500.00 of bonds. These bonds were later issued. The 517 shares of stock, being certificate N1220 issued in the name of Phoenix Finance System, Inc. turned in by it in this transaction consisted of [fol. 579] 477 shares which had originally been issued to Shaffer & Company as a part of the payment on the superstructure and sold to Thompson & Company at $70.00 per share, and had been transferred to the Phoenix Finance System, Inc., under date November 1st, 1931 and 40 shares which had been purchased by John A. Thompson from the bridge company on November 5, 1930 and transferred to Phoenix Finance System, Inc. on November 1st, 1931, and on such 40 shares said Thompson did wrongfully pay a commission of 15% to Thompson & Company. That this action was a part of the fraudulent scheme, plan and conspiracy. It was falsely and fraudulently stated in the preambles of the resolution;

"Whereas, it again became [evidence] to the officers and directors of the company that there was a probability that the construction work would have to be abandoned because of lack of funds, with the attendant sacrifice of funds already [expensed] the company through its directors, solicited the Phoenix Finance System, Inc., and its affiliated corporations to provide and/or guarantee the necessary capital, and pursuant to these negotiations, Phoenix Finance System, Inc., agreed to purchase from the company a substantial amount of its preferred and common stock upon the express promise and agreement of the company that it would save the said Phoenix Finance System, Inc. free and harmless from any loss it might sustain on account thereof, and upon the express promise and guarantee that in the event the said Phoenix Finance System, Inc. was unable to sell the said stock to the public within a reasonable time, the company would, upon request of said Phoenix Finance System, Inc., purchase the same."

That the said statements were false and fraudulent in that there was not any previous motion or resolution passed by either the directors or stockholders, authorizing the Phoenix Finance System, Inc. to act as fiscal agents for the bridge

company, nor did it act as such fiscal agent. It did not sell stock for the bridge company. And in that there was no agreement on the part of the bridge company to repurchase any stock from the Phoenix Finance System, Inc.

That neither on the 5th day of January, 1932, nor at any time thereafter did the Iowa-Wisconsin Bridge Company have any surplus with which to make a repurchase of its stock. When the attempted purchase of Phoenix Finance System, Inc. stock was made the Articles of Incorporation of the bridge company contained the provisions aforesaid, and that at that time there was outstanding other Class A stock held by other stockholders, who were not given the [fol. 580] permission or opportunity to surrender Class A stock and to receive bonds, and that no notice of intention of the corporation to redeem class A stock was mailed or given to stockholders of such stock, except to Thompson and his controlled companies. That all of the Class A stock was not purchased by the bridge company at that time through the issuance of bonds or otherwise, nor was a portion of said Class A stock redeemed proportionately, nor was there any legal authorizing vote on the part of the stockholders of the bridge; that the attempted exchange of Class A stock for bonds caused an impairment of the capital. And that the said action of said Thompson-Phoenix Finance System, Inc. in the exchange of Class A stock for bonds was fraudulent and for the purpose of conferring upon himself and his company a preference over the Class A stockholders, and resulted in such unlawful preference, and was passed and brought about by the fraudulent representations, pretenses and tokens aforesaid, which were made with fraudulent intent to cheat and defraud [and] bridge company and its stockholders and as a part of the fraudulent scheme, plan and conspiracy.

(q) That at a reconvened meeting of directors of the Iowa-Wisconsin Bridge Company held on the 7th day of March, 1932, which was dominated and controlled by said Thompson and Phoenix Finance System, Inc., in furtherance of the scheme, plan and conspiracy, a purported resolution was passed, authorizing and directing the secretary-treasurer to deliver to said Phoenix Finance System, Inc. Class B bonds of the bridge company in the sum of $60,-

500.00 and to credit on the books $109.86 to the Phoenix Finance System, Inc. and to receive from the Phoenix Finance System, Inc. certificate of said 517 shares of Class A stock of the company properly assigned and as a part of such plan, scheme and conspiracy, such bonds were delivered to the Phoenix Finance System, Inc. and said 517 shares of Class A stock represented by Certificate N1220 assigned in blank, received from it and cancelled, and on the 15th day of March, 1932, certificate N1239 for 517 shares was issued to the Iowa-Wisconsin Bridge Company. And [fol. 581] at said meeting a purported resolution was adopted for the delivery of $97,000 of Class A bonds of the bridge company to the Phoenix Finance System, Inc. for the purported mortgage of $50,000 and interest thereon and $10,000 Industrial Contracting Company; $9,000.00 to Kramer & Hogg and $11,262.71 to McClintic Marshall & Company, with interest on such items amounting to $83,811.29, and with discount on the bonds of $12,727.31, making a purported total of $69,538.58 and a purported balance of $461.42 being charged to the Phoenix Finance System, Inc. on the books of the bridge company, making a total of $97,000.00. That the aforesaid $10,000 to the Industrial Contracting Company was neither due from nor paid by the bridge company and the bridge company did not owe the $11,262.71 to McClintic-Marshall Company; that said two items were fully covered and disposed of by the bridge company in its settlement with John W. Shaffer & Company and were items which Thompson & Company, subsidiary of Phoenix Finance System, Inc., had undertaken to pay, and the Iowa-Wisconsin Bridge Company did not owe the alleged mortgage of $50,000.00 with interest thereon, but on the contrary the same was wholly fraudulent.

(r) That subsequently at a director's meeting of the Iowa-Wisconsin Bridge Company held on the 7th day of July, 1933, controlled and dominated by the said John A. Thompson and his associates, a purported resolution was passed for the delivery of $20,100.00 Class B Bonds to the Phoenix Finance Corporation without proper consideration.

(s) That the Phoenix Finance Corporation at the time of its organization was officered and controlled by the same officers as was the Phoenix Finance System, Inc. and had

full notice of the facts and circumstances surrounding the bond issue of the Iowa-Wisconsin Bridge Company and assumed the entire fruits and activities of its predecessor, Phoenix Finance System, Inc., and proceeded to carry on with the same notice and purpose, adopting all of the plans and results of its predecessor.

[fol. 582] (t) That the First Trust & Savings Bank (formerly Bechtel Trust Company) and A. H. Schubert were named as trustees in the purported deed of trust of the Iowa-Wisconsin Bridge Company, securing the aforesaid bonds; that the Phoenix Finance Corporation in furtherance of said plan, scheme and conspiracy caused a Bill of Foreclosure to be filed by said trustees on the 28th day of August 1933 in the office of the Clerk of the United States District Court in and for the Northern District of Iowa, Eastern Division, Dubuque, Iowa, for appointment of a receiver and strict foreclosure of the alleged deed of trust and bonds aforesaid of the Iowa-Wisconsin Bridge Company and praying that the bridge company and all persons claiming under it be barred and foreclosed of all equity of redemption. That the said Phoenix Finance Corporation, in furtherance of such scheme and plan undertook to save the said trustees harmless from attorneys' fees, costs and expenses connected with said cause; that by leave of court a petition of intervention was filed by stockholders of the Iowa-Wisconsin Bridge Company in said action and said action defended by the interveners, alleging in substance that at the time of the execution of the deed of trust and issuance of the bonds, the bridge company was under the control and domination of John A. Thompson and his associates who owned a controlling interest in and controlled the Phoenix Finance System, Inc. and that the aforesaid bonds were issued as a part of a fraudulent scheme, plan and conspiracy to deprive the bridge company and its stockholders of their property; that it appearing before the court that the Phoenix Finance Corporation was the holder of substantially 90% of the $200,000 of bonds sought to be foreclosed, it on motion of interveners, was made a party co-complainant in said action. That the aforesaid $60,500.00 Class B bonds

and 517 shares of Class A stock were involved in said action.

(u) That the petitioner, Phoenix Finance Corporation, with respect to said $60,500.00 of bonds and 517 shares of stock aforesaid filed its Exception #4 to the Master's report, a copy of which is hereto attached, marked Exhibit "A" and made a part hereof.

[fol. 583] (v) That the United States District Court for the Northern District of Iowa heard said cause and filed its opinion, findings of fact and decree, holding that all of the bonds of the Iowa-Wisconsin Bridge Company held by the Phoenix Finance Corporation, were fraudulent and void, issued as a part of a scheme, plan and conspiracy to defraud. (Courts opinion, finding of fact and decree reported 19 Fed. Supp. 127.) That attached hereto and marked Exhibit "B" and made a part hereof is a copy of the court's final decree.

(w) That the Phoenix Finance Corporation filed a petition for rehearing in said cause in which it alleged among other things:

"As further ground for the relief herein prayed, Phoenix Finance Corporation shows to the Court that through inadvertence, oversight or misapprehension of the facts in this case, the Court invalidated $60,500.00 of Bridge Company bonds held by Phoenix Finance Corporation, for which the last named company surrendered to the Bridge Company 517 shares of its capital stock, which was the admitted property of Phoenix at the time, and the court has wholly failed to reinvest Phoenix with this stock, but on the contrary has not alone invalidated the bonds but deprived Phoenix of the capital stock which it surrendered therefor." • • •

"Third. In case rehearing is denied, the decree be so modified as to reinvest in petitioner 517 shares of A stock surrendered in exchange for bonds."

(x) That said United States District Court for the Northern District of Iowa rendered its opinion and order overruling said petition for rehearing, copy of which are hereto attached, marked Exhibits C and D.

(y) That the petitioner appealed from said decisions of the United States District Court for the Northern District of Iowa to the United States Circuit Court of Appeals, Eighth Circuit, which appeal involved said $60,-500.00 of Class B bonds of the Iowa-Wisconsin Bridge Company and the claim that the said 517 shares of stock should be re-issued. See Exhibit "E" attached hereto and made a part hereof. That said Circuit Court of Appeals denied such claims and affirmed the decision of the trial court. (98 Fed. (2nd) 416). And Petition for Writ of Certiorari to the Supreme Court of the United States was denied and the order of the Circuit Court of Appeals entered affirming the decision of the trial court.

[fol. 584] V. Answering paragraph eight of the complaint, the respondent denies the first sentence thereof and alleges that the aforesaid 517 shares of stock were cancelled when the bonds were fraudulently obtained as a part of a fraudulent scheme, plan and conspiracy, and that also the delivery of said bonds under Section #14 of Delaware Corporation Law was invalid and void.

VI. Answering paragraph 9 of the complaint, the respondent denies the allegations thereof except as herein modified and explained. The respondent alleges that it did not pay semi-annual interest on said bonds; that the petitioner and its president, John A. Thompson, dominated the bridge company and controlled its books, and went through the fiction and pretense of purportedly advancing funds to the bridge company and then paying itself such alleged interest from said funds in an attempt to create an apparent bar to the bridge company claiming or asserting said bonds were invalid and void. Respondent admits that it has refused to pay interest on said bonds.

VII. Answering paragraph ten of the complaint respondent denies the allegations thereof, except as hereinafter modified or explained. The respondent alleges that a certificate number N1239 was issued as above stated in this answer for 517 shares.

VIII. Answering paragraph 11 the respondent denies the same except as herein modified. The respondent alleges that the said 517 shares and all questions relating to it and the claims to right of reissue were fully litigated in the aforesaid action pending in the United States Dis-

trict Court for the Northern District of Iowa and on appeal before the United States Circuit Court of Appeals, and that petitioner therein contended that it was entitled to have said shares re-issued and respondent contended that it was not entitled to have said shares reissued; that they were used as an instrumentality to perpetrate a fraud on respondent, and that the decisions of the United States District Court for the Northern District of Iowa and the decision of the United States Circuit Court of Appeals for the Eighth Circuit and the orders and decrees ren-
[fol. 585] dered in pursuance of such decisions, are res judicata, and that such decisions should and ought to be given full force and effect under the provisions of Article IV, Section 1, Article III, Sections 1 and 2 and Article IV. Section 2 of the Constitution of the United States; and that the petitioner is barred and estopped from maintaining this case.

IX. Answering paragraph 12 of the complaint respondent alleges that the United States District Court for the Northern District of Iowa and the United States Circuit Court of Appeals for the Eighth Circuit have held said bonds fraudulent and void and without consideration.

X. Further answering said complaint, the respondent alleges that the petitioner does not come into this court of equity with clean hands, and that by the lapse of time and laches and the Statute of Limitations, the petitioner is barred from maintaining this action.

Wherefore respondent prays that petitioner's petition be dismissed with costs and that respondent have such other and further relief as may be just and equitable.

IOWA-WISCONSIN BRIDGE COMPANY,
By Fred Biermann,
Vice-President.

Attest:

IRENE M. BELL,
Secretary-Treasurer.
(Corporate Seal)

DANIEL F. WOLCOTT,
F. A. ONTGES,
Solicitors for Respondent.

State of Iowa,
County of Winneshiek—ss.:

Be It Remembered that on this 8th day of March, A. D. 1939, personally appeared before me, the subscribed, a Notary Public for the State and County aforesaid, Fred Biermann, who being by me first duly sworn according to law, did depose and say:

That he is Vice-President of Iowa-Wisconsin Bridge Company, the respondent named in the foregoing Answer; [fol. 586] that he has read the foregoing Answer and knows the contents thereof; that what is set forth in said Answer, so far as the same relates to his own act and deed, or to the act and deed of said respondent, is true, and so far as the same relates to the act and deed of any other person or persons he believes the same to be true; that he has executed the foregoing Answer on behalf of the corporation pursuant to authority of the Board of Directors.

FRED BIERMANN.

Sworn to and subscribed before [—] the day and year aforesaid.

NAOMI O'NIEL,
Notary Public in and for
Winneshiek County, Iowa.

(Notarial Seal)

My commission expires July 4, 1939.

Exhibit "A"

Exception No. 4

It excepts to the Master's finding in Nos. 5, 6, and 7, shown at pages 19-20 of the report, in disallowing $60,500.00 of bonds transferred to Phoenix, and in failing to find that said bonds were valid obligations of the bridge company

For the reason that—

1. The record discloses that these bonds took up not only the 517 shares of Class A stock which had been issued to Phoenix as collateral for money advanced, but actually paid a contracted debt of $51,700.00, and the balance goes

to make up the $60,500.00 and was discounted so as to make the bonds yield 8 percent. (See Exhibit 31 page 340 Par. (e) and testimony of John A. Thompson.)

The Master is in error in concluding that it was a stock retirement in discriminatory favor to shares consummatedly issued. The record discloses that Phoenix advanced $51,700.00 of money, not for the purchase of 517 shares of stock, but the stock was issued to it to secure said advancement. It is true that said advances were made through the contractor and it is likewise true that the 517 shares were transferred through said contractor, but the Agreement, "Exhibit "E" provided:—

"In consideration of the premises and the benefits to Third Party, by reason of any endorsements or guarantees of First party, the Third party hereby agrees that in event Second party fails to pay and discharge all of the payments aforesaid and/or first party is required to advance any sums of money by reason of any endorsement or guarantee in connection with the financing of the said Black Hawk Bridge then and in that event the Third party agrees to pay to First party on demand a sum equal to the total amount due to First party from all causes in connection with said financing of said bridge."

[fol. 587] Therefore, Phoenix was entitled to be repaid for these advances plus 8% interest. This $51,700.00 was a loan by Phoenix rather than a stock purchase.

There appears in the records of the corporation, in the Minutes of its regular-board meeting held on January 5, 1932, shown at page 338 of "Exhibit 31", the following:

Whereas, it again became evident to the officers and directors of the company that there was a probability that the construction work would have to be abandoned because of lack of funds, with the attendant sacrifice of the funds already expended, the company, through its officers, directors, and stockholders, solicited the Phoenix Finance System, Inc. and its affiliated corporations, to provide, and/or guarantee the necessary capital, and pursuant to these negotiations Phoenix Finance System, Inc. agreed to purchase from the company a substantial amount of the preferred and common stock, upon the express promise and

guaranty of the company that it would save the said Phoenix Finance System; Inc. free and harmless from any loss it might sustain on account thereof, and upon the further express promise and guaranty that in the event that said Phoenix Finance System, Inc., while it was unable to sell said capital stock to the public within a reasonable time, the company would upon request of the Phoenix Finance System, Inc. re-purchase the same; and

Whereas, in spite of its efforts, due to prevailing unfavorable economic conditions, the said Phoenix Finance System, Inc. has been unable to dispose of a substantial amount of said stock, and now owns and holds 517 shares of Class A preferred stock and 500 shares of Class B common stock; and

Whereas, the said Phoenix Finance System Inc. has now made demand upon the company to repurchase the said stock in accordance with the said agreement; and

Whereas, the company recognizes the obligation to repurchase the stock and is desirous of so doing; and

Whereas, the company has recently authorized the creation and issuance of first mortgage bonds in the principal sum of $200,000.00, for the purchase of acquiring funds with which to discharge and satisfy its corporate obligations;

Now, therefor, be it resolved:

(a) That the company forthwith repurchase from Phoenix Finance System, Inc. 517 shares of Class A preferred stock of the company, and pay therefor to the said Phoenix Finance System, Inc. the sum of $51,700.00, with interest thereon from January 1, 1931 at the rate of 6 per cent per annum.

(page 340)

That the president and secretary shall dispose of said bonds or any part thereof, upon such terms and conditions and at such price as to them in their absolute discretion shall be to the best interests of the company, and in such amount as may be necessary to provide funds in the sum of $51,700.00, with which to repurchase said Class A preferred

stock of the company from the Phoenix Finance System, Inc., as herein specially provided.

[fol. 588] That the president and secretary be authorized to deliver the said bonds, or that part thereof which may be necessary to the said Phoenix Finance System, Inc., in satisfaction and payment of the company's obligation to said Phoenix Finance System, Inc., as herein provided for, in such face amount as will on the basis of an 8 per cent yield equal the sum of $51,700.00."

At a meeting of the board of directors of the Bridge Company on March 7, 1932, the following proceedings were had, with reference to said 517 shares of stock. The record will be found at page 346 of "Exhibit 31."

"The following resolution was then offered by Mr. English, who moved its adoption:

Whereas, it has heretofore been ordered by the board of directors that the company repurchase from the Phoenix Finance System, Inc. 517 shares of Class A preferred stock of the company, for a consideration of $51,700.00, plus interest at the rate of 6 per cent per annum from January 1, 1931 to January 31, 1932, in the amount of $3,360.50, or a total of $55,060.50, and by reason of the fact that the corporation is without funds with which to pay the same, and for the further reason that it is impossible to sell or dispose of said bonds at this time, that there be delivered to the said Phoenix Finance System, Inc. Series B bonds of the company in a sufficient amount to cover the same, on the basis of an 8 per cent yield "

The foregoing was unanimously adopted.

The directors present at this meeting were: Emory H. English, J. A. Thompson, M. K. Thompson, Oscar R. Thorson, H. T. Wagner, A. B. Wilder.

Testimony Outside The Corporate Records.

In connection with this transaction, Mr. Thompson testified:

"There were $60,500 (bonds) issued to the Phoenix Finance Corporation, for funds advanced by the Phoenix Finance System, Inc. in conjunction with the building of

the bridge, the return of which fund had been guaranteed by both verbal and written contracts, and in conjunction with which 517 shares of preferred stock of the Iowa-Wisconsin Bridge Company was temporarily held by Phoenix until those funds could be repaid, with 8 percent interest."

To the same effect, see pages 188 and 229 of the same transcript. And on page 230 of the same transcript is the following:

"Q. Now $51,700.00 that was represented by stock held by Phoenix Finance Corporation?

A. The stock was collateral connected with the transaction."

The record thus discloses that it was a liquidation of a valid obligation of the bridge company to Phoenix, and which was not violative of the Delaware Law, nor of the articles of incorporation, and in holding otherwise the Master was in error.

[fol. 589] (Note by the clerk of the District Court: The final decree of the District Court, dated December 1, 1936, which is made a part of original Exhibit SC-102, is omitted here because it is the same as Exhibit "C" which is a part of the Supplemental and Ancillary Bill of Complaint, and appears at folio pages 77 to 79 of this transcript.)

[fol. 590] Exhibit "C".

(Opinion of District Court on Overruling of Petitions for Rehearing and Motion for Vacation of Original Decree, etc.).

United States District Court, Northern District of Iowa, Eastern Division.

First Trust & Savings Bank, formerly named Bechtel Trust Company, and A. H. Schubert, Trustees, Plaintiffs,
No. 220. vs. In Equity.
Iowa-Wisconsin Bridge Company, Defendant, Fayette D. Kendrick, et al., Interveners.

After several years struggle by the parties, the above cause came on for final decree on the first of December, 1936, and on that date the Court filed its opinion, its find-

ings of fact and conclusions of Law, and entered its final decree. On December 19th, 1936, Phoenix Finance Corporation filed a motion to vacate the decree and dismiss the cause upon the ground that the Court had lost jurisdiction of the cause when it permitted the Phoenix Finance Corporation to be made a party co-plaintiff with the trustees under the mortgage. The theory was that jurisdiction had rested on diversity of citizenship, and the making of Phoenix Finance Corporation a Delaware corporation, co-plaintiff, destroyed diversity of citizenship inasmuch as the Iowa-Wisconsin Bridge Company was also a Delaware corporation. For reasons stated in the supplemental opinion filed January 5th, 1937, the motion to vacate the decree and dismiss the cause was overruled. On January 29th, 1937, Phoenix Finance Corporation filed its petition for re- [fol. 591] hearing and modification of decree, and on the same date the trustees filed their motion to vacate and dismiss, similar to that previously filed by Phoenix Finance Corporation, and also in the alternative adopted the petition for rehearing of Phoenix Finance Corporation. The Interveners in behalf of the Bridge Company filed motions to strike and resistances to the petitions for rehearing. On the 18th day of February, 1937, these motions and petitions were fully argued orally before the Court and briefs submitted, and all matters then before the Court submitted.

The Court has determined to entertain the petitions for rehearing and modification of decree, rather than to strike the same, and dispose of the same on their merits. Respecting the motions to vacate and dismiss for want of jurisdiction, that matter has been fully answered by the supplemental opinion of the Court filed on the submission of a like motion by Phoenix Finance Corporation, on January 5th, 1937. The petition for rehearing filed by Phoenix Finance Corporation and adopted by the plaintiff trustees, rests upon the claim that the Master to whom the cause was referred in its entirety, received the submission under a misapprehension, and that the plaintiffs had also been of impression that they were to take further testimony at some future time when they submitted their bonds to the Master or to the Court. They further contend that the cause in behalf of the trustees and the Phoenix Finance Corporation was mismanaged by their counsel, and that

now having taken in new blood at the bar, the present counsel should be given a chance to try the case over.

Having in mind the analogy of petitions for rehearing in equity causes and motions for new trial in law causes, the Court is unable to find any substantial merit in any of the claims for a rehearing. The defense interposed to the plaintiffs' cause of action was that the bond issue and mortgage securing the same were all a part of a deliberate fraudulent scheme to obtain possession and ownership of the bridge after its completion and freeze out all of the stockholders. This scheme as alleged and as proven, dated back to the inception of a certain $50,000. mortgage, and proceeded forward including the plans and their execution for the issuing of the bonds and mortgaging of the bridge. During all of this time the Phoenix Finance System Incorporated, and its successor Phoenix Finance Corporation, and the Bridge Company had interlocking directorates. The so-called Thompson interests predominated in all of them. As the Master pointed out in his fourth conclusion of law, in the circumstances with the charge of fraud and conspiracy made, the burden was on the plaintiffs who had brought the suit at the instance of the Phoenix corporations, to show clean hands and fair dealing. This the plaintiffs not only failed to do, but through out combated the interveners who were permitted to defend in behalf of the Bridge Company. The interveners obtained an Order of Court for the production of books and records of the Phoenix Finance Corporation before the Master, but Phoenix Finance Corporation vigorously and successfully it appears prevented the production of those books and records, and its officer when on the stand before the Master declared his inability to produce, for they had been sent to the State of Florida. It is now with poor grace that the plaintiffs invoke the discretion of the Court for a rehearing in order to use those very books and records. Anticipating an adverse ruling, the petitioners alternatively pray for a modification of the decree with provisions commanding the re-issuing of certain shares of stock to Phoenix Finance Corporation, which it canceled when fraudulently obtaining the bonds. One might conceive some invidious analogies to this situation. Having attempted the strong box of another, and being hoist by what is now claimed to be a premature explosion,

they volubly invoke the compassion of the Court to restore valuable implements of their craft left behind. I see no [fol. 592] reason why a court of equity should be deeply concerned in giving an affirmative relief to the Phoenix Finance Corporation. On the other hand I think the petitions for rehearing should be denied and the motion to dismiss and vacate the decree overruled, and it will be so ordered.

Dated March 4th, 1937.

GEO. C. SCOTT,
United States District Judge.

Filed in the District Court, March 4th, 1937.

Exhibit "D".

(Order Overruling Petitions for Rehearing and Motion for Vacation of Original Decree, etc., March 4, 1937).

United States District Court, Northern District of Iowa, Eastern Division.

First Trust & Savings Bank, formerly named Betchel Trust Company and A. H. Schubert, Trustees, Plaintiffs,
No. 220. vs. In equity.
Iowa-Wisconsin Bridge Company, Defendant, Fayette D. Kendrick, et al., Interveners.

On the 18th day of February, 1937, in pursuance of a previous assignment, there came before the Court the petitions for rehearing of the First Trust & Savings Bank, formerly named Bechtel Trust Company, and A. H. Schubert, Trustees, and Phoenix Finance Corporation, and also the motion of said trustees for a vacation of the Original decree herein and a dismissal of the cause for want of jurisdiction, and said motion and petitions having been fully argued by counsel for the respective parties in interest, were duly submitted and taken under advisement. And the Court now being fully advised in the premises, finds, the said motion and petitions to be without merit.

And it is now Ordered that the prayer of each of the petitions for rehearing be denied and that the motion to

vacate and dismiss be overruled, and an exception reserved to the moving and petitioning parties.

Done and Ordered this 4th day of March, 1937.

GEO. C. SCOTT,
United States District Judge.

Filed in the District Court, March 4, 1937.

Exhibit "E".

Copy of Assignment of Claimed Error.

Vol. II.

Transcript of Record.

[fol. 593] United States Circuit Court of Appeals, Eighth Circuit.

First Trust and Savings Bank and A. H. Schubert, as Trustees, and Phoenix Finance Corporation, Appellants,

No. 11,055. vs. In Equity.

Iowa-Wisconsin Bridge Company, a Corporation, Defendant, and Fayette D. Kendrick, Warren G. Hayes, Anna W. Schuster, T. H. Bakewell and Ernest W. Haverland, Interveners, Appellees.

Appeal from the District Court of the United States for the Northern District of Iowa.

10.

(a) The court erred in approving and adopting the Master's Findings of Fact Nos. 5, 6, and 7 to the effect that the bonds for $60,500 issued in exchange for stock were invalid as in contravention of the statutes of Delaware and of the Articles of Incorporation of the Bridge Company, for the reason that under the contracts and agreements of the parties the stock was held not as a stockholder, but as collateral for money advanced for the benefit of the Bridge Company.

(b) And in this connection, even if the interpretation placed upon the contract by the parties is incorrect and not binding upon the Bridge Company, nevertheless in finding that the bonds were improperly issued in exchange for the stock and were, therefore invalid, the court should also have found that the Bridge Company retained in its possession said stock so delivered in exchange for the bonds, and that same should be redelivered to the parties entitled thereto.

(c) And the court erred in finding that there was any fraud in connection with this transaction. The evidence does not justify any such finding.

(See page 510, Vol. II. Transcript of Record)

Appellants' Brief And Argument In Said Cause.

Specification of errors intended to be urged by Appellants.

13. The court further erred in failing and refusing to require the Bridge Company to restore the status quo of the parties and to redeliver the stock in exchange for the bonds, as particularly set forth in assignment of error No. 10 (Rec. p. 510).

(See page 14, of Appellant's Brief and Argument)

[fol. 594] April 3, A. D. 1939—Motion for decree notwithstanding answer filed which said motion is as follows:

Comes Now, the Complainant, Phoenix Finance Corporation, by Marvel, Morford & Logan, its solicitors of record, and moves for a decree in accordance with the prayers of its complaint notwithstanding the answer filed herein by the respondent Iowa-Wisconsin Bridge Company.

ARTHUR G. LOGAN,
MARVEL, MORFORD & LOGAN,
Solicitors for Phoenix Finance Corporation.

To the Honorable Wm. Watson Harrington, Chancellor of the State of Delaware

Application is hereby made pursuant to Rule 44 for a hearing upon the foregoing motion within thirty days from the date of filing thereof.

ARTHUR G. LOGAN,
MARVEL, MORFORD & LOGAN,
Solicitors for Phoenix Finance Corporation.

I, Arthur G. Logan, solicitor for the Complainant, Phoenix Finance Corporation, do hereby certify that the foregoing motion for a decree notwithstanding the answer is in my judgment the proper method for the trial of the cause and that it is not made for purposes of delay.

ARTHUR G. LOGAN,
Solicitor for Phoenix Finance Corporation.

State of Delaware,
New Castle County,—ss.:

I, Anthony F. Emory, Register of the Court of Chancery of the State of Delaware, in and for New Castle County, do hereby certify that the foregoing is a true and correct copy of the Bill of Complaint, Answer and exhibits and motion for decree notwithstanding answer, together with the docket entries appertaining, in the case entitled Phoenix Finance Corporation vs. Iowa-Wisconsin Bridge Company,

as the same remains on file and of record in said Court.

[fol. 595] In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at Wilmington, this twenty-eighth day of February in the year of our Lord, nineteen hundred and forty.

(Seal)

ANTHONY F. EMORY,
Register in Chancery.

State of Delaware, to-wit:

I, William Watson Harrington, Chancellor of the State of Delaware, do hereby certify that the foregoing Record and Attestation, made by Anthony F. Emory, Esquire,

Register in Chancery within the County of New Castle whose name is thereto subscribed, and to which the seal of said Court is affixed, are in due form of law, and made by the proper officer.

In Testimony Whereof, I have hereunto set my hand, this twenty-eighth day of February in the year of our Lord, nineteen hundred and forty.

WILLIAM WATSON HARRINGTON,
Chancellor.

State of Delaware,
New Castle County,—ss.:

I, Anthony F. Emory, Register of the Court of Chancery of the State of Delaware, in and for New Castle County, do hereby certify that the Honorable William Watson Harrington, by whom the foregoing attestation was made and whose name is thereto subscribed, was at the time of the making thereof, and still is Chancellor of the State of Delaware, duly commissioned and sworn, to all whose acts as such full faith and credit are and ought to be given, as well in Courts of Justice as elsewhere.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court, at Wilmington, this twenty-eighth day of February in the year of our Lord nineteen hundred and forty.

(Seal) ANTHONY F. EMORY,
Register in Chancery.

Filed in the District Court, March 20, 1940.

[fol. 596] (Exhibit S. C. 103)

State of Delaware,
New Castle County—ss.:

I, Martin G. Hannigan, Prothonotary of the Superior Court of the State of Delaware, in and for New Castle County, do hereby certify that the foregoing pages contain a true copy of the whole Record and Proceedings in the case there stated as the same now remains in the Superior Court of the said State, at Wilmington.

CLERK'S COPY.

Vol. II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1940~~ 1941

No. ~~624~~ 19

PHOENIX FINANCE CORPORATION, PETITIONER,

vs.

IOWA-WISCONSIN BRIDGE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH DISTRICT

PETITION FOR CERTIORARI FILED DECEMBER 13, 1940.

CERTIORARI GRANTED JANUARY 20, 1941.

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 11,734

CIVIL.

PHOENIX FINANCE CORPORATION A CORPORATION OF THE STATE OF DELAWARE, APPELLANT,

vs.

IOWA-WISCONSIN BRIDGE COMPANY, A CORPORATION, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA

REFILED MAY 22, 1940.

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Judd & Detweiler (Inc.), Printers, Washington, D. C., Feb. 25, 1941.

In testimony whereof, I hereunto set my hand and affix the seal of the said Court, this Seventh day of March A. D. One thousand nine hundred and forty.

(Seal) MARTIN G. HANNIGAN.

State of Delaware, to-wit:—

I, Daniel J. Layton, Chief Justice of the State of Delaware, and as such, the Presiding Judge of the Superior Court of the said State, do hereby certify that the foregoing Record and attestation, made by Martin G. Hannigan Esq., Prothonotary of the said Court, within the County of New Castle, whose name is thereto subscribed, and to which the seal of said Court is affixed, are in due form, and made by the proper officer.

In testimony whereof, I hereunto set my hand, this Seventh day of March A. D. One thousand nine hundred and forty.

Chief Justice.

[fol. 597] State of Delaware,
New Castle County—ss.:

I, Martin G. Hannigan, Prothonotary of the Superior Court of the State of Delaware, in and for the County of New Castle, do certify that the Honorable Daniel J. Layton, Esquire, by whom the foregoing attestation was made, and whose name is thereto subscribed, was at the time of making thereof, and still is, Chief Justice of the State of Delaware, and, as such, the Presiding Judge of the Superior Court of the said State, duly commissioned and sworn, to all whose acts, as such, full faith and credit are, and ought to be, given, as well in Courts of Justice as elsewhere.

In testimony whereof, I hereunto set my hand and affix the seal of the said Court, this Seventh day of March A. D. One thousand nine hundred and forty.

MARTIN G. HANNIGAN,
(Seal) Prothonotary.

[fol. 598] In the Superior Court of the State of Delaware in and for New Castle County

Summons Case

September Term 1939.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 65 vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

Please issue summons case to the September Term, A. D. 1939.

MARVEL MORFORD & LOGAN,
Attorneys for Plaintiff.

To

Martin G. Hannigan, Prothonotray

June 21, 1939.

Filed June 21, 4:12 P. M. '39, Martin G. Hannigan, Prothonotary.

[fol. 599] Sum Case

New Castle County—ss.:

The State of Delaware,

To the Sheriff of New Castle County,—Greeting:

We Command You, That you summon Iowa-Wisconsin Bridge Company a corporation duly organized and existing under the laws of the State of Delaware late of your County Company so that it be and appear before the Judges of our superior Court at Wilmington, on Monday the Eighteenth day of September next to answer Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware of a plea of tresspass on the case, etc.

And have you then there this Writ.

Witness, the Honorable Daniel J. Layton, at Wilmington, the First day of May in the year of our Lord one thousand nine hundred and thirty-nine.

Issued Jun. 22 1939.

MARTIN G. HANNIGAN,
Prothonotary.

(Seal)

[fol. 600] .177

Sept. Term A. D. 1939.

Phoenix Finance Corporation a corporation duly organized and existing under the laws of the State of Delaware,

No. 65 vs.

Iowa-Wisconsin Bridge Company a corporation duly organized and existing under the laws of the State of Delaware.

Sum Case

MM&L, Esqs. Pro.q

Summoned Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware, by serving a copy of the within writ upon Charles S. Peabbleo, Assistant Secretary of the Corporation Trust Company, said Corporation Trust Company being Resident Agent in the State of Delaware for the said Iowa-Wisconsin Bridge Company, a corporation as aforesaid, on the twenty-third day of June A. D. 1939. The President or other head officers of the said Iowa-Wisconsin Bridge Company, a corporation as aforesaid, not being found within the State of Delaware.

SAMUEL M. FORD,
Sheriff.

Cost .75
Mg .10

.85

In Sheriff's Hands
June 23 904 AM '39
New Castle County

[fol. 601] In the Superior Court of the State of Delaware in and for New Castle County

Summons Case

September Term, 1939.

M. M. & L.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

W. & G.

No. 65 vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

Sept. 11, 1939. Ward & Gray enter appearance for deft.

Sept. 18, 1939. Affidavit of Demand filed, copy delivered.

[fol. 602] (Affidavit of Demand.)

In the Superior Court of the State of Delaware in and for New Castle County

Summons Case

September Term 1939.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 65 vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

State of Florida,
County of Pinellas—ss.:

Before Me, Josie Lee Bates, a Notary Public for the State of Florida and the County aforesaid, personally comes M. K. Thompson, Treasurer of Phoenix Finance Corporation, the plaintiff above named, who being by me duly sworn according to law, deposes and says:

That she is Treasurer of Phoenix Finance Corporation, the said plaintiff; that annexed hereto are true and correct copies of the promissory notes sued on in this action; that the sum demanded of the said defendant is the sum of Twelve Thousand Six Hundred Ten Dollars and Nineteen Cents ($12,610.19) with interest at the rate of 8% per annum on the sum of Twelve Thousand One Hundred Ten Dollars and Nineteen Cents ($12,110.19) from the 7th day of July, 1933, and interest at the rate of 8% per annum on the sum of Five Hundred Dollars ($500.00) from the 31st day of December, 1932, said interest rates of 8% being the lawful rate of interest in the State of Iowa at the time of the making and delivery of said promissory notes, and the said deponent further says that she verily believes that the said sum of Twelve Thousand Six Hundred Ten Dollars and Nineteen Cents ($12,610.19) with interest as aforesaid is justly and truly due from the said defendant to the said plaintiff.

M. K. THOMPSON.

Corporate seal

[fol. 603] Sworn to and subscribed before me, this 30th day of June, A. D. 1939.

JOSIE LEE BATES,
Notary Public.

Notarial Seal

[fol. 604] $ ° ° 500. ° ° Des Moines, Iowa, December 31, 1932.

On the 31 day of June, 1933, for value received we promise to pay to the order of Phoenix Finance Corporation the sum of Five Hundred and No/100 Dollars Payable at 316 12th Street, Des Moines, Iowa. with interest at 8 per cent. for annum from date. Interest payable semi annually.

Upon default of payment of this note, the makers, endorsers, guarantors, and sureties, agree to pay all attorneys' fees and expenses of collection, and consent that any justice of the peace may have jurisdiction on this note to the amount of $300.00, and we do hereby severally waive demand of payment, protest, and notice of protest of this note and consent that time of payment may be extended

without notice. A failure to pay interest when due, shall cause this note to become due.

IOWA-WISCONSIN BRIDGE COMPANY,
By Oscar R. Thorson, Secy-Treas.

P. O. Address .....

No. .....

[fol. 605] Des Moines, Iowa.

$12,110.19 July 7, 1933.

On Demand, for value received, the undersigned promises to pay to the order of the Phoenix Finance Corporation at its office in Des Moines, Iowa, the sum of Twelve Thousand One Hundred Ten and 19/100 Dollars ($12,110.19) with interest payable semi annually at the rate of Eight (8%) per cent per annum from date.

Default in the payment of any installment of interest hereof, shall at the option of the holder hereof and without notice render the then unpaid balance of the principal hereof and accrued interest thereon, at once due and payable.

Extension of the time of payment of all or any part of the amount owing hereon at any time, or times, shall not affect the liability of said party hereto.

And, we, the undersigned, hereby transfer and deliver to the legal holder of the above note, as collateral security, for the payment of said note and of any other liabilities of the undersigned to the said payee or assigns, due or to become due, or that hereafter may be contracted, the following Class B. bonds of the Iowa-Wisconsin Bridge Company described as Follows:

Bond Nos.	Denomination	Maturity Date	Total
106 to 111 inc.	$ 100 00	Feb. 1, 1947	$ 600 00
119	500 00	Feb. 1, 1947	500 00
121 to 130 inc.	500 00	Feb. 1, 1949	5,000 00
131	5000 00	Feb. 1, 1950	5,000 00
132 to 139 inc.	500 00	Feb. 1, 1951	4,000 00
142	5000 00	Feb. 1, 1952	5,000 00
			20,100 00

The undersigned hereby gives the said payee or assigns, authority to sell the said bonds or any part thereof or any substitutes therefor, and all additions thereto, on the maturity of the above note, or any time thereafter, at any public or private sale, the option of the said payee or assigns, without publishing notice of the same, or giving notice, with the right to said payee or assigns themselves to be the purchasers. And after deducting all costs and expenses, including legal attorney's fees, to apply the residue of proceeds of sale to the payment of any, either or all liabilities as aforesaid, as said payee or assigns shall elect, returning the overplus to the undersigned; and in case the said proceeds shall not cover the principal, interest and said expenses, the undersigned promises to pay the deficiency immediately after such sale with interest on the unpaid balance of principal at 8% per annum.

Signed by authority of the Board of Directors of the Iowa-Wisconsin Bridge Company this 7th day of July, 1933.

IOWA-WISCONSIN BRIDGE COMPANY,
By Emory H. English, Vice President,
By Oscar R. Thorson,
Corporate Seal Secretary Treasurer.

[fol. 606] In the Superior Court of the State of Delaware
In and For New Castle County.

Summons Case.

September Term, 1939.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 65. vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

Sept. 18, 1939. Narr filed, copy delivered. Rule pleas by first general rule day in October.

[fol. 607] In the Superior Court of the State of Delaware
In and For New Castle County.

September Term, 1939.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 65. vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

New Castle County:—ss.:

Iowa-Wisconsin Bridge Company, a corporation of the State of Delaware, the defendant in this suit, was summoned to answer Phoenix Finance Corporation, a corporation of the State of Delaware, the plaintiff in this suit, of a plea of trespass on the case upon promises, and thereupon the said plaintiff, by Marvel, Morford & Logan, its attorneys, complains:

For That Whereas, the said defendant, heretofore, to-wit, on the 31st day of December, A. D. 1932, at Des Moines, in the County of Polk, State of Iowa, to-wit, at New Castle County aforesaid, made its certain promissory note in writing bearing date the day and year aforesaid, and thereby then and there promised to pay on the 31st day of June, A. D. 1933, to the order of the said plaintiff, for value received the sum of Five Hundred Dollars ($500.00), payable at 316 12th Street, Des Moines, Iowa, with interest at 8% per annum from the date thereof, payable semi-annually, and then and there delivered the said promissory note to the said plaintiff; by means whereof and by force of the statute in such cases made and provided, it, the said defendant, then and there became liable to pay to the said plaintiff the said sum of money in said promissory note specified, according to the tenor and effect of said promissory note; and being so liable, it, the said defendant, in [fol. 608] consideration thereof, afterwards, to-wit, on the day and year aforesaid, at New Castle County aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sum of money in said promissory note specified, according to the tenor and effect thereof.

And Whereas Also, the said defendant, heretofore, to-wit, on the 7th day of July, A. D. 1933, at Des Moines, in the County of Polk, State of Iowa, to-wit, at New Castle County aforesaid, made its certain promissory note in writing, bearing date the day and year aforesaid, and thereby then and there promised to pay, on demand, for value received, to the order of the said plaintiff, at its office in Des Moines, Iowa, the sum of Twelve Thousand One Hundred Ten Dollars and Nineteen Cents ($12,110.19), with interest, payable semi-annually, at the rate of 8% per annum from the date thereof, and then and there delivered the said promissory note to the said plaintiff; by means whereof and by force of the statute in such cases made and provided, it, the said defendant, then and there became liable to pay to the said plaintiff the said sum of money in said promissory note specified, according to the tenor and effect of said promissory note; and being so liable, it, the said defendant, in consideration thereof, afterwards, to-wit, on the day and year aforesaid, at New Castle County aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sum of money in said promissory note specified, according to the tenor and effect thereof. And the said plaintiff in fact says that afterwards, to-wit, on or about the 1st day of October, A. D. 1933, to-wit, at the County aforesaid, payment of said sum of money in said promissory note specified was duly demanded by the plaintiff of the said defendant, according to the tenor and effect of said promissory note.

[fol. 609] And Whereas Also, the said defendant, heretofore, to-wit, on the 7th day of July, A. D. 1933, at Des Moines, in the County of Polk, State of Iowa, to-wit, at New Castle County aforesaid, made its certain promissory note in writing, bearing date the day and year aforesaid, and thereby then and there promised to pay, on demand, for value received, to the order of the said plaintiff, at its office in Des Moines, Iowa, the sum of Twelve Thousand One Hundred Ten Dollars and Nineteen Cents ($12,110.19), with interest, payable semi-annually, at the rate of 8% per annum from the date thereof, and then and there delivered the said promissory note to the said plaintiff; by means whereof and by force of the statute in such cases made and provided, it, the said defendant, then and there became

liable to pay to the said plaintiff the said sum of money in said promissory note specified, according to the tenor and effect of said promissory note; and being so liable, it, the said defendant, in consideration thereof, afterwards, to-wit, on the day and year aforesaid, at New Castle County aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sum of money in said promissory note specified, according to the tenor and effect thereof.

And Whereas Also, the said defendant, afterwards, to-wit, on the 1st day of January, A. D. 1934, at Des Moines, in the County of Polk, State of Iowa, to-wit, at New Castle County aforesaid, was indebted to the said plaintiff in the sum of Fifteen Thousand Dollars ($15,000.00), for so much money by the said plaintiff before that time lent and advances to the said defendant at its like special instance and request.

And Also in the further sum of Fifteen Thousand Dollars ($15,000.00), like lawful money, for so much money by the said plaintiff before that time paid, laid out and expended to and for the use of the said defendant at its like special instance and request.

And Also in the further sum of Fifteen Thousand Dollars ($15,000.00), like lawful money, for so much money by [fol. 610] the said defendant before that time had and received to and for the use of the said plaintiff.

And Whereas Also, the said defendant, afterwards, to-wit, on the day and year aforesaid, at the County aforesaid, accounted with the said plaintiff of and concerning divers other sums of money from the said defendant to the said plaintiff before that time due and owing and then in arrears and unpaid, and on such accounting the said defendant was then and there found to be in arrear and indebted to the said plaintiff in the further sum of Fifteen Thousand Dollars ($15,000.00) of like lawful money.

And Whereas Also, the said defendant, afterwards, to-wit, on the 1st day of July, A. D. 1939, at Des Moines, in the County of Polk, State of Iowa, to-wit, at New Castle County aforesaid, was indebted to the said plaintiff in the further sum of Seven Thousand Dollars ($7,000.00), like

lawful money, for so much money before that time and then due and payable from the defendant to the said plaintiff for interest upon and for the forbearance of divers large sums of money before then lent and advanced by the said plaintiff to the said defendant at its special instance and request, and by it, the said plaintiff, forborne to the said defendant for divers long spaces of time before then elapsed, at the like special instance and request of the said defendant, and also for other money before that time and then due and payable from the said defendant to the said plaintiff for interest upon and for the forbearance of divers other large sums of money before then due and owing from the said defendant to the said plaintiff, and by it, the said plaintiff, forborne to the said defendant for divers large spaces of time before then elapsed, at the like special instance and request of the said defendant.

And Being So Indebted, it, the said defendant, in consideration thereof, afterwards, to-wit, on the several dates aforesaid, at Des Moines, in the County of Polk, State of Iowa, to-wit, at New Castle County aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said aforementioned sums of money when it, [fol. 611] the said defendant, should be thereunto afterwards requested.

Nevertheless, the said defendant, not regarding its said several promises and undertakings in this behalf, did not pay to the said plaintiff the several sums of money above mentioned, or any of them, or any part thereof, although often requested so to do; but the said defendant hath hitherto neglected and refused and still doth neglect and refuse to pay the same to the said plaintiff, to the damage of the said plaintiff of the sum of Twenty-five Thousand Dollars ($25,000.00), and therefore it brings its suit, &c.

MARVEL MORFORD & LOGAN,
Attorneys for Plaintiff.

[fol. 612] Copy of Instruments Sued Upon.

$°°500.00°° Des Moines, Iowa, December 31, 1932.

On the 31 day of June, 1933, for value received we promise to pay to the order of Phoenix Finance Corporation the

sum of Five Hundred and No/100 Dollars Payable at 316 12th Street, Des Moines, Iowa, with interest at 8 per cent. per annum from date. Interest payable semi annually.

Upon default of payment of this note, the makers, endorsers, guarantors and sureties, agree to pay all attorneys' fees and expenses of collection, and consent that any justice of the peace may have jurisdiction on this note to the amount of $300.00, and we do hereby severally waive demand of payment, protest, and notice of protest of this note and consent that time of payment may be extended without notice. A failure to pay interest when due, shall cause this note to become due.

IOWA WISCONSIN BRIDGE COMPANY,
By Oscar R. Thorson, Secy-Treas.

P. O. Address .....

No. .....

[fol. 613] Des Moines, Iowa.

$12,110.19 July 7, 1933.

On Demand, for value received, the undersigned promises to pay to the order of the Phoenix Finance Corporation at its office in Des Moines, Iowa, the sum of Twelve Thousand One Hundred Ten and 19/100 Dollars ($12,110.19) with interest payable semi annually at the rate of Eight (8%) per cent per annum from date.

Default in the payment of any installment of interest hereof, shall at the option of the holder hereof and without notice render the then unpaid balance of the principal hereof and accrued interest thereon, at once due and payable.

Extension of the time of payment of all or any part of the amount owing hereon at any time, or times, shall not affect the liability of said party hereto.

And we, the undersigned, hereby transfer and deliver to the legal holder of the above note, as collateral security,

for the payment of said note and of any other liabilities of the undersigned to the said payee or assigns, due or to become due, or that hereafter may be contracted, the following Class B. bonds of the Iowa-Wisconsin Bridge Company described as follows:

Bond Nos.	Denomination	Maturity date	Total
106 to 111 inc.	$ 100 00	Feb. 1, 1947	$ 600 00
119	500 00	Feb. 1, 1947	500 00
121 to 130 inc.	500 00	Feb. 1, 1949	5,000 00
131	5000 00	Feb. 1, 1950	5,000 00
132 to 139 inc.	500 00	Feb. 1, 1951	4,000 00
142	5000 00	Feb. 1, 1952	5,000 00
			20,100 00

The undersigned hereby gives the said payee or assigns, authority to sell the said bonds or any part thereof or any substitutes therefor, and all additions thereto, on the maturity of the above note, or any time thereafter, at any public or private sale, at the option of the said payee or assigns, without publishing notice of the same, or giving notice, with the right to said payee or assigns themselves to be the purchasers. And after deducting all costs and expenses, including legal attorney's fees, to apply the residue of proceeds of sale to the payment of any, either or all liabilities as aforesaid, as said payee or assigns shall elect, returning the overplus to the undersigned; and in case the said proceeds shall not cover the principal, interest and said expenses, the undersigned promises to pay the deficiency immediately after such sale with interest on the unpaid balance of principal at 8% per annum.

Signed by authority of the Board of Directors of the Iowa-Wisconsin Bridge Company this 7th day of July, 1933.

IOWA-WISCONSIN BRIDGE COMPANY,
By Emory H. English, Vice President,
By Oscar R. Thorson
Secretary-Treasurer.

Corporate Seal

[fol. 614] Bill of Particulars.

For money lent and advanced to Iowa-Wisconsin Bridge Company by Phoenix Finance Corporation, to-wit, on or about the 31st day of December, A. D. 1932	$ 500.00
For interest due and owing upon the above sum of money by Iowa-Wisconsin Bridge Company to Phoenix Finance Corporation from the 31st day of December, A. D. 1932 to date	300.00
For money lent and advanced to Iowa-Wisconsin Bridge Company by Phoenix Finance Corporation, to-wit, on or about the 7th day of July, A. D. 1933	12,110.19
For interest due and owing upon the above sum of money by Iowa-Wisconsin Bridge Company to Phoenix Finance Corporation from the 7th day of July, A. D. 1933 to date...	6,700.00

[fol. 615] In the Superior Court of the State of Delaware
In and For New Castle County.

Summons Case.

September Term, 1939.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 65. vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

Sept. 19, 1939. Time for filing affidavit of defense extended to Oct. 3, 1939, by consent of the respective attorneys.

Oct. 3, 1939. Affidavit of defense filed, copy sent to M. M. & L. attorneys for Plaintiff.

[fol. 616] (Affidavit of Defense.)

In the Superior Court of the State of Delaware in and for New Castle County

Summons Case

September Term, A. D. 1939.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 65 vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

State of Iowa,
Cerro Gordo County—ss.:

Be It Remembered that on this 30th day of September A. D. 1939, before me, F. T. Barrett, a Notary Public of the state of Iowa, in and for Cerro Gordo County, personally comes Irene M. Bell, Secretary and Treasurer of the Iowa-Wisconsin Bridge Company, the defendant above named, who being by me duly qualified according to law, deposes and says that she is the Secretary and Treasurer of the Iowa-Wisconsin Bridge Company, defendant in the above named suit, and that she verily believes that there is a legal defense to the whole of the cause of action in said suit, the nature and character of which defense is fraud, want of consideration, former adjudication, want of lawful authorized execution and delivery, and offset.

That John A. Thompson was president of and interested in and with his wife M. K. Thompson and associates A. B. Wilder and Emery H. English, controlled the Phoenix Finance System Incorporated and other affiliated companies.

That M. White was John A. Thompson's secretary and an officer of the Phoenix Finance System Incorporated.

[fol. 617] That Thompson & Company was a wholly owned subsidiary of the Phoenix Finance System Incorporated and was but an agency adjunct and instrumentality of the Phoenix Finance System, Inc. and used as such.

That in October and November 1930 through negotiations with John W. Shaffer and Vernon W. O'Connor, John A. Thompson became president of and acquired control of the Iowa-Wisconsin Bridge Company (hereinafter called the Bridge Company). At about the same time the number of directors of the Bridge Company was increased and Thompson together with other directors of the Phoenix Finance System, Inc. became directors of the Bridge Company. From that time on, Thompson controlled the Bridge Company.

On November 26, 1930, a stated settlement as of October 31, 1930, was made between the Standard Shares Holding Company and the Bridge Company, under which there were delivered to the Bridge Company by its trustees, liquid assets, such as cash, bills and accounts receivable, stocks and bonds, inventoried at $90,235.68; construction accounts representing amounts which had been paid for construction to date aggregating $183,496.90, and equipment, etc., amounting to $1,986., and commission and organization and expense accounts amounting to $75,231.08, making a total of $350,950.00, and there had been sold by said trustee for the account of the Bridge Company stock of the latter at $100 per share, amounting to $350,950.00. The settlement also provided for the return of all stock of the Bridge Company held by said trustee except 1500 shares of Class B stock, which were returned to the Bridge Company in consideration of a so-called management contract, the terms of which are immaterial in this litigation. On the $90,935.00 of liquid assets, there was later realized over $79,000.00 in cash and the Bridge Company had treasury stock in the amount of $390,050.00 to build its superstructure and complete its bridge. The substructure was practically complete and the sub-contractor thereof had [fol. 618] been paid within $8200.00 of the total cost and the grading was well under way.

Under date of November 11, 1930, a contract for the completion of the bridge was entered into between the Bridge Company, acting through John A. Thompson as president and John W. Shaffer & Company, which included erection of super-structure of the bridge, erection of piles and trestles over certain sloughs, erection of toll house,

etc., and surfacing of roadway and whereby the Bridge Company agreed to and did pay $10,000 in cash and agreed to and did deliver 3200 shares of its capital stock at a fixed price of $320,000 to John W. Shaffer & Company, and Shaffer & Company in said contract agreed to furnish a surety bond to insure the obligations of said Shaffer & Company. Extras were required to be ordered in writing. John W. Shaffer & Company sublet the contract for steel to McClintic-Marshall Company and the construction work to the Industrial Contracting Company.

In November 1930 immediately after the issuance of said 3200 shares of stock to Shaffer & Company the latter company sold said stock to Thompson & Company and received the promissory note of Thompson & Company for $224,000 therefor.

That about the first of November 1930 140 shares of Bridge Company stock were issued to Phoenix Finance System, Inc. and the value thereof fixed at $100 per share, to-wit: $14,000. That upon the issuance of such stock Phoenix Finance System, Inc. became indebted to the Bridge Company for said amount. That such amount has not been paid. That the Phoenix Finance System, Inc. disposed of such stock to the public. That thereafter John A. Thompson, then president of the Bridge Company, dominating and controlling the Bridge Company, and his associates caused the execution of a purported guaranty contract providing for the turning over to the Phoenix Finance System, Inc., such stock without payment therefor. That in such transaction John A. Thompson acted in a dual capacity as president of the Bridge Company and as president of the Phoenix Finance System, Inc. and acted [fol. 619] in the interests of himself and his affiliated companies as against the interests of the Bridge Company and dealt with himself in such transaction. That the Bridge Company has not received consideration for the aforesaid stock and there is due the Bridge Company on account thereof the sum of $14,000 with interest.

That John A. Thompson on November 5, 1930 purchased 65 shares of Bridge Company stock from the Bridge Com-

pany at $100 per share, and on the same day A. B. Wilder, also a director of the Bridge Company, purchased 10 shares of Bridge Company stock from the Bridge Company at $100 per share. That on the 31st day of December, 1930, Thompson & Company purchased 170 shares of Bridge Company stock from the Bridge Company at $100 per share. That subsequent to such purchase of stock by John A. Thompson and A. B. Wilder on the 31st day of December, 1930 the said John A. Thompson through his dominant control of the Bridge Company, credited to Thompson & Company on the books of the Bridge Company 15% commission on all of the aforesaid stock in the sum of $3,675.00. That it was the duty of John A. Thompson and A. B. Wilder as directors of the Bridge Company to assist in selling stock owned by the Bridge Company. That in the selling of said stock no exceptional or extraordinary services were rendered and they were not entitled to credit for said commissions.

A stockholders' meeting of the Bridge Company was held March 10, 1931, which was controlled by the stock of Thompson & Company and John A. Thompson, 1310 shares and proxies held by Thompson 375 shares, a total of 1685 shares out of 2586 shares represented, at which meeting a board of directors was elected controlled by said Thompson. Following said stockholders' meeting, a directors' meeting was held attended by only Thompson directors, viz., V. W. O'Connor, John A. Thompson, A. B. Wilder and Oscar R. Thorson. At this meeting, there was passed a purported resolution providing for the issuance of a $50,000 mortgage to the Phoenix Finance System, Inc., on the properties of the Iowa-Wisconsin Bridge Company which resolution contained the false and fraudulent recital [fol. 620] that funds received from sale of stock had been inadequate to properly finance the rapid completion of the bridge; whereas, the Bridge Company then had nothing to do with the sale of stock and it had delivered to J. W. Shaffer & Company $320,000 of its [sotck] and $10,000 in cash for the completion of the bridge. That pursuant to such resolution a mortgage was executed to Phoenix Finance System, Inc. for $50,000 signed on behalf of the Bridge Company by A. B. Wilder, who was then also an officer and director of said mortgage company. That in

truth and in fact no indebtedness of said Bridge Company to the Phoenix Finance System, Inc. existed and the Bridge Company received no consideration for the execution of said mortgage; that the same was and is wholly without consideration, fraudulent and void. At said time said Thompson caused entries to be made on the books of said Bridge Company purporting to show the receipt of $50,000 in cash, whereas, in truth and in fact, said amount and no part thereof was received by the Bridge Company.

That about the 11th of March 1931 John A. Thompson and his affiliated companies, through the dominant control of the Iowa-Wisconsin Bridge Company, caused a payment of $3000 to be made from the funds of the Bridge Company to A. B. Wilder through the medium of checks issued to John W. Shaffer and immediately endorsed and delivered to A. B. Wilder, and $1000 thereof was then turned over to Thompson & Company by said Wilder. That the said Wilder was then an officer and director of the Phoenix Finance System, Inc., and also a director of the Bridge Company. That no resolution was passed by the stockholders or directors of the Bridge Company authorizing such payments to said Wilder nor was there any action taken or resolution passed by the Bridge Company providing for the payment of any amount to said Wilder for services nor had there been nor were there any exceptional or extraordinary services rendered by said Wilder to the Bridge Company. That no consideration passed to the [fol. 621] Bridge Company for such sums. That the said Thompson and his affiliated companies controlling the Bridge Company, so manipulated its books as to cause fictitious entries to be made thereon as though said sums were paid on approaches, when in fact no work was done on approaches for which said sums or any part thereof was a proper payment. That payment of said amounts was a misappropriation of the Bridge Company's funds.

That on the 1st day of November 1931 John A. Thompson and his affiliated companies through the exercise of dominant control of the Bridge Company turned over to the Bridge Company $5,410.85 of notes taken by Thompson & Company stock owned by Thompson & Company and with which Thompson & Company held as collateral such

stock sold by it. That said Thompson & Company took or received from the Bridge Company $5,410.85 for such notes. That in such transaction John A. Thompson acted in a dual capacity as president of the Bridge Company and as president of the Phoenix Finance System, Inc., and controlling its subsidiary Thompson & Company and acted in the interests of himself and his affiliated companies against the interests of the Bridge Company and dealt with himself in such transaction. The Bridge Company at the time of such transaction did not have any surplus from which it could purchase any of its stock.

That notwithstanding the alleged mortgage Thompson & Company continued to sell its bridge stock through its agents at $100 per share, on the representation that the Bridge Company had no funded debt, and concealed the fact of the existence of said mortgage from stockholders and directors of the Bridge Company.

That on August 6, 1931, John W. Shaffer & Company owed Industrial Contracting Company $10,000; McClintic-Marshall Company $11,262.71, and to Kramer & Hogg an amount, then in dispute, Shaffer & Company also claimed to be entitled to payment for certain steel; certain extra labor and material, and commissions. There were also [fol. 622] other matters in dispute between the Bridge Company and Shaffer & Company with reference to the bridge contracts. To make a complete settlement, a stated settlement contract was made August 6, 1931, between the Bridge Company, as party of the first part, and John W. Shaffer, V. W. O'Connor, John W. Shaffer & Co., and Standard Shares Holding Company, as parties of the second part, which was executed on behalf of the Bridge Company, by J. A. Thompson as president and which provided:

(a) That the Bridge Company transfer to the other parties to the contract 120 shares of its common stock and 80 shares of its preferred stock and certain other securities which were of the value of $2,475, and pay to Kramer & Hogg the balance due them.

(b) That the second parties (Shaffer, O'Connor, Standard Shares Holding Company and Shaffer & Company)

accept such consideration "as full and complete settlement of all sums due them and/or any of them and for full satisfaction and stated settlement of any and all claims of all kinds whatsoever arising out of any contract or other relations between the parties hereto and/or pertaining in any way to said toll bridge and second parties separately and jointly hereby release said Iowa-Wisconsin Bridge Company fully and completely. Second parties hereby specifically acknowledge receipt of full payment for all engineering, designing and building of said bridge, and for all material, services and all other things pertaining to said bridge."

The Bridge Company pursuant to this contract delivered 200 shares of its stock of the value of $20,000 and other securities of the value of $2,475.

That at about the same time John W. Shaffer agreed to and did turn over to Thompson of Thompson and Company, and president of the Phoenix Finance System, Inc., $10,000 of the Bridge Company stock (100 shares received by Shaffer) and Thompson & Company agreed to pay $10,000 owing to the Industrial Contracting Company and $11,262.71 owing to the McClintic-Marshall Company. Neither the Industrial Contracting Company nor the Mc-[fol. 623] Clintic-Marshall Company had any contract with the Bridge Company, nor was the Bridge Company indebted to them in any amount.

On September 24, 1931, the Industrial Contracting Company drew a sight draft on Phoenix Finance System, Inc. for the balance of $10,000 due them which Thompson & Company had agreed to pay and for which the Bridge Company was not liable. As a part of the fraudulent scheme and plan, leading up to the issuance of the bonds hereinafter mentioned, said John A. Thompson caused entries and deposits and withdrawals on the Bridge Company's records to be made, purporting to show that Phoenix Finance System, Inc. had advanced to the Bridge Company the sum of $10,000 and that the Bridge Company had made payment on said sight draft, and pretended thereby to show an indebtedness of $10,000 due from the Bridge Company to Phoenix Finance System, Inc., whereas, in truth and in fact, the said amount was an obligation of Thomp-

son & Company and not of the Bridge Company, and nothing was due from the Bridge Company to Phoenix Finance System, Inc. on account thereof.

That on November 11, 1931, a meeting of the directors of the Bridge Company was held at which a majority present were dominated by John A. Thompson, as president. At this meeting it was represented by John A. Thompson that there was due the Phoenix Finance Corporation $54,000 on the purported mortgage of March 10, 1931, and $10,000 for money advanced Industrial Contracting Company; that there was other indebtedness including a claim of McClintic-Marshall Company for $12,000 and further obligations aggregating $40,000. That at said meeting resolutions were adopted providing for a bond issue of $200,000; for a stockholders' meeting to consider the bond issue; for the delivery of bonds to pay the $50,000 mortgage; and for the payment of other alleged claims.

On the same date, a letter prepared at the dictation of John A. Thompson, and signed by Oscar R. Thorson, as [fol. 624] Secretary-Treasurer, of the Bridge Company, under his direction was sent to the stockholders of said Bridge Company. In said letter it was falsely and fraudulently represented to the stockholders of the Bridge Company for the purpose of inducing said stockholders to approve the proposed bond issue of $200,000, and to induce them to forward proxies to said Thompson and his associates, as follows:

(a) That in October, 1930, negotiations were opened with Phoenix Finance System, Inc., to lend its aid in arranging for the financing of the completion of the bridge and to save the project from absolute failure.

(b) That there was an understanding that the Phoenix Finance would be repaid by the Bridge Company on demand for any such advances that might be required to be made by it temporarily in order to fulfill the guarantee and to permit the continuation of work on the bridge.

(c) That sale of stock to the public showing no improvement and in order that the work on the bridge might not be delayed Phoenix Finance System, Inc. made substantial advances.

(d) That construction of the bridge went forward without delay and the cash required for material and labor was advanced regularly by the Phoenix Finance Company.

(e) That there had been advanced by the Phoenix Finance System, Inc. to the Bridge Company in the payment of bills for labor and [meterial] to complete the bridge approximately $70,000, $50,000 of which is secured by a mortgage which was due December 10, 1931.

(f) In addition to the sum of $70,000 which has been advanced by the Phoenix Finance System, Inc. there will be immediately required the further sum of approximately $25,000 to complete payment of outstanding obligations.

(g) The board of directors was confronted with the problem of raising additional funds with which to satisfy the claims of Kramer & Hogg and McClintic-Marshall and Company in order to prevent threatened liens and litigations to collect these amounts.

[fol. 625] (h) There was never intended that this cash advanced by Phoenix Finance System, Inc. to the Bridge Company should be of a permanent nature and it must be repaid.

That the aforesaid representations were misleading, false and fraudulent.

That following the aforesaid letter, notice of a proposed stockholders' meeting for December 22, 1931, with form of proxy running to Emory H. English, Oscar R. Thorson and J. R. Thompson enclosed was sent to Class B. voting stockholders and the fraudulent statements contained in the letter of November 11, 1931, were not corrected, nor was any true information given with respect thereto. That said notice called for a special meeting of Class B voting common stock, to consider and authorize directors to borrow, not to exceed $200,000; to authorize the execution of mortgage bonds, not to exceed that amount, and to provide the terms and conditions under which such bonds should be issued; to authorize the directors to convey to a named trustee by mortgage deed of trust all of the property and assets of the company to secure the payment of the principal and interest of such bonds; to authorize the

directors to sell, pledge or otherwise dispose of such bonds and to apply the proceeds thereof to such corporate purposes as the board might from time to time determine. In response to such letter of November 11, 1931, and said notice of November 20, 1931, the proxies of stockholders were procured reading to Oscar R. Thorson, Emory H. English and J. R. Thompson, Emory H. English and Oscar R. Thorson being the representatives of John A. Thompson, and these proxies were voted by Oscar R. Thorson in unison with the stock and proxies held by John A. Thompson, controlled and dominated the stockholders' meeting held on December 22, 1931, as part of the scheme, plan and conspiracy. At this meeting Oscar R. Thorson voted by proxy 1011 shares and in person 18 shares and John A. Thompson by proxy 505 shares and in person 137 shares and Mrs. John A. Thompson in person 20 shares, M. White [fol. 626] 18 shares. The shares thus voted by Thorson, John A. Thompson, M. K. Thompson and M. White being 1709 shares, which were more than a majority of the 2608 shares represented at the meeting. That at said meeting there was adopted a resolution authorizing the issuance of first mortgage bonds in the aggregate principal sum of $200,000, and the conveyance by mortgage deed of trust of all of the property of the Bridge Company to secure the payment of such bonds. The resolution relating to the bond issue was voted and carried by the votes of said John A. Thompson and his controlled associates Oscar R. Thorson, M. White and his wife M. K. Thompson. Such resolution was presented at said stockholders meeting with false preambles and representations as reasons or excuse for voting the bond issue as follows:

(a) "Whereas it was originally contemplated that the funds necessary to construct the Blackhawk Bridge would be acquired through the sale of stock and whereas a substantial part of the funds were acquired in that manner, but due to a change in general economic conditions [its] developed that it was impossible to realize sufficient funds from that source as rapidly as the same were required to complete the bridge project economically,

(b) "Whereas, it was necessary for the company to borrow funds to expedite the completion of said bridge and avoid disaster and whereas the amount of steel required

and cost of building the bridge was greatly in excess of the cash originally estimated.

(c) "Whereas, there now remains unsold capital stock of the company in the approximate amount of $120,000.

(d) "Whereas, it now becomes necessary for the company to raise sufficient funds with which to pay loans made to the company by the Phoenix Finance System, Inc. a greater portion of which is secured by mortgage on the property of the company and which is now past due.

(e) "Whereas, the company for these and other corporate purposes will be presently required to borrow not to exceed $100,000 to discharge these obligations and others [fol. 627] which it is contemplated will presently arise.

(f) "Whereas, it is anticipated that additional funds, not to exceed $100,000 may from time to time be required to discharge present or future obligations of the company to provide for the payment of pavement and improvement of dike and to care for flood conditions and other emergencies.

(g) "Whereas, the company finds itself unable to acquire funds for these [pruposes] except through the creation and issuance of bonds secured by mortgage deed of trust covering the assets, property and income of the property, and whereas the interests of the stockholders would be jeopardized unless such funds or a part thereof are made available within a reasonable time."

That the aforesaid preamble, statements and representations were misleading, false and fraudulent and made with intent to deceive and defraud the Bridge Company and its stockholders. That said meeting was wholly controlled and dominated by John A. Thompson and his associates, officers and directors of the Phoenix Finance System, Inc. That other stockholders, relying on the aforesaid false and fraudulent statements contained in said letters and notice and [believeing] the same to be true and knowing not to the contrary sent a proxy in the form aforesaid. That independent stockholders at said meeting relying on the aforesaid representations and believing the same to be true and not knowing the contrary voted for such resolutions, and independent and uncontrolled stockholders who voted

for such resolutions did so on account of being deceived by the aforesaid false representations.

That following such special meeting, a directors' meeting was held, dominated and controlled by John A. Thompson, at which meeting a purported resolution was passed with respect to the $50,000 mortgage, and with reference to the issuance of the bonds therefor; that at said meeting it was represented and claimed by John A. Thompson that it was a valid and bona fide mortgage, and that said John A. Thompson did not disclose the fact that the alleged [fol. 628] mortgage was not based on a proper consideration, and that the same was fraudulent; and that such independent directors as were present, voting for such resolution on the said representations of said John A. Thompson, believed the same to be true, knowing nothing to the contrary and were deceived thereby.

On January 5, 1932, a directors' meeting of the Bridge Company was held at which there were present four Thompson controlled directors, Emory H. English, Oscar R. Thorson, A. B. Wilder and M. White, and no others, at which meeting these four Thompson-Phoenix Finance System, Inc. directors passed a resolution to purchase from the Phoenix Finance System, Inc. 517 shares of Class A. preferred stock for $51,700., with interest at the rate of 6% from January 1, 1931, and to deliver Class B bonds of the Bridge Company in such face amount as would on the basis of 8% yield $51,700 with interest thereon which amounted to $60,500 of bonds. That neither on the 5th day of January, 1932, nor at any time thereafter did the Iowa-Wisconsin Bridge Company have any surplus with which to make a repurchase of its own stock.

That while the Articles of Incorporation of the Bridge Company contain the following provisions set forth in paragraph seven of the interveners' petition of intervention, and paragraph eleven of these findings of fact, the Bridge Company, through the influence of the said Thompson and his associates, caused $60,500 of said bonds to be issued to the said Thompson or his owned and controlled [instiutions]. When that was done, there was outstanding other Class A stock held by other stockholders who were not given the permission or opportunity by the Bridge Com-

pany, as was the said Thompson and his affiliated companies, to surrender such Class A stock and receive bonds, as did the said Thompson and his institutions. That no notice of intention of the corporation to redeem said Class A. shares was mailed or given to holders of said stock, as required by said paragraph seven of the Articles of Incorporation, except to the said Thompson and his controlled [fol. 629] companies. That in other words, all of the said Class A stock was not purchased by the Bridge Company at said time through the issuance of the said bonds or otherwise, nor was a portion of the said Class A stock redeemed proportionately, as provided by the Articles of Incorporation set forth in paragraph seven of the petition of intervention and paragraph 11 of these findings. And at said time the said Class A stock was thus surrendered by the said Thompson without notice to the other stockholders similarly situated, and that such transaction took place without a legal authorizing vote, on the part of the stockholders or directors of the Bridge Company. That so far as Thompson and his associates were concerned, they were voting under the influence of Thompson, but so far as independent stockholders and directors were concerned, they did not know the true facts when they voted for the pretended authorizing resolution.

That when the said Thompson and his companies exchanged the said Class A stock for the said bonds in the amount of approximately $60,500, such action caused an impairment of the capital of the corporation in violation of said Delaware statute.

That the action of the said Thompson, in promoting said exchange of Class A stock for bonds, was fraudulent and for the purpose of conferring on himself a preference over other holders of Class A stock. That by thus conspiring and acting fraudulently the said Thompson did acquire a preference over other holders of such Class A stock.

That on March 7, 1932, a meeting of the board of directors of the Bridge Company was held at which were present Emory H. English, John A. Thompson, M. K. Thompson, Oscar R. Thorson, H. T. Wagner and A. B. Wilder, all Thompson and Phoenix Finance System, Inc., controlled directors, at which a purported resolution was

adopted for the delivery of $97,000 of Class A bonds of the Bridge Company to the Phoenix Finance System, Inc. for the purported $50,000 mortgage and interest thereon and [fol. 630] for $10,000 to the Industrial Contracting Company, $9000 to Kramer & Hogg and $11,262.71 to McClintic-Marshall Company, with interest on such items amounting to $83,811.29 and with discount on the bonds of $12,727.31, making a purported total of $96,538.58 and a purported balance of $461.42 being charged to Phoenix Finance System, Inc. on the books of the Bridge Company, making a total of $97,000.

The aforesaid $10,000 to the Industrial Contracting Company was neither due from nor paid by the Bridge Company as aforesaid and the Bridge Company did not owe the $11,262.71 to McClintic-Marshall Company. That said two items were items that had been fully covered and disposed of by the Bridge Company in its settlement with John R. Shaffer & Company and were items which Thompson & Company, subsidiary of Phoenix Finance System, Inc. had undertaken to pay. That as a part of the scheme, plan and conspiracy leading up to the issuance of said bonds hereinafter mentioned, the said Thompson paid the balance of $11,262.71 to McClintic Marshall Company and as a form and pretense the said John A. Thompson, dominating and controlling the Bridge Company in its acts, in making payment thereof for the Phoenix Finance System, Inc. as aforesaid, attempted to carry out such transaction as though he was making payment thereof for the Bridge Company and caused false entries to be made on the books of the Bridge Company as though said approximate amount had been advanced by the Phoenix Finance System. Inc. to the Bridge Company and the item paid by the Bridge Company, when in fact the Bridge Company did not owe said item.

That on July 7, 1933, a meeting of the board of directors of the Bridge Company was held at which there were present John A. Thompson, Emory H. English, Oscar R. Thorson, H. T. Wagner, A. B. Wilder, M. K. Thompson and G. W. Huntley, all but one of the members present, G. W. Huntley, being Thompson-Phoenix Finance Corporation controlled directors.

[fol. 631] At this meeting vice-president Emory H. English and Secretary Thorson reported a purported indebtedness to the Phoenix Finance Corporation of $12,110.19 on open account and $5,625 on notes, which included the $500 note sued upon in this cause, $9806.10 of said $12,110.19 being purported interest furnished by Phoenix Finance Corporation on the aforesaid fraudulent bonds held by the Phoenix, which were known to the officers of the Phoenix Finance Corporation to be fraudulent, and $1505.75 being charged to the Bridge Company for Phoenix Finance Corporation officers and employes, and an item of $650 which was merely a journal entry and which neither the Bridge Company gained nor lost. During the period the officers of the Phoenix thus purportedly charged the Bridge Company for salaries of the Phoenix Finance System, Inc., officers and employes, the Bridge Company was paying for its own toll-keepers and was paying Thorson $500 per month as Secretary-Treasurer to take care of its accounts which did not require such bookkeeping and there was no occasion for charging the Bridge Company with the salaries of the Phoenix Finance System, Inc. officers and employes, because it had ample help of its own.

On motion of Wagner, seconded by Wilder, a resolution was adopted through the Thompson-Phoenix Finance Corporation controlled directors, directing the execution of a demand note to the Phoenix for $12,110.19, being the $12,110.19 note sued upon in this cause, to cover the purported items contained in said open account and instructing the treasurer to pledge $21,100 of the Class B Bridge Company bonds as collateral to this note and to three other purported notes, which latter notes are the ones set up in plaintiff's demand, one for $2000 and one for $3125 and one for $500, hereinafter further referred to. Said $500 note being the $500 note sued upon in this cause.

At the time of the purported payment of interest on the purported bonds through an alleged loan of the Phoenix [fol. 632] Finance Corporation to the Bridge Company, John A. Thompson, Emory H. English and A. B. Wilder were directors and officers of the Phoenix Finance Corporation, and were also officers and directors of the Bridge Company and controlled its accounts and the debits and credits

placed on the books of the Bridge Company, the actual entries being made by M. Graney, an employee and assistant secretary of the Phoenix Finance Corporation. John A. Thompson and Emory H. English, to carry out a purported transaction as though the payment of interest were made by the Bridge Company, on the 7th day of February, 1933, made a deposit for the Phoenix Finance Corporation to the account of the Bridge Company in the sum of $6,896.00 and on the same date they drew three checks to the Bechtel Trust Co., one No. 189, for $6,480 payment of interest; one No. 190 for $15.00 payment of Government tax, and one No. 191 for $401.00 marked accounts payable, representing the charge of the Bechtel Trust Company, making the aggregate of $6,896. These checks on the part of the Bridge Company were all signed by M. Graney, employees of the Phoenix Finance Corporation. A check for $6,480 representing interest, was thereafter remitted to Phoenix Finance Corporation, they being the holders of all the bonds on which interest was paid. On the 10th day of February, 1933, as though the Bridge Company was paying interest on the bonds, the said Thompson and Emory H. English deposited to the account of the Bridge Company, by the Phoenix Finance Corporation, $2,910.00. At the same time a check was written on the account of the Bridge Company in the Des Moines National Bank, No. 193, for $2,910.00 to Bechtel Trust Company, being dated February 9th, 1933, payment of interest due January 1st, 1933, on Class A bonds held by Phoenix Finance Corporation. This check was also signed by M. Graney.

The purported interest payment on bonds was a mere manipulation of Thompson and officers and employees of the Phoenix Finance Corporation while controlling the Bridge Company and its books and accounts for the purpose of making it appear as though the Bridge Company paid [fol. 633] interest on the fraudulent bonds and with the evident purpose of attempting to create a supposed waiver in favor of the Phoenix Finance Corporation of the fraudulent character of the bonds, or an estoppel, to the detriment of the Bridge Company.

That there is an item of $109.86 being for claimed balance on the invalid and fraudulent exchange of 517 shares of stock for bonds.

That none of the aforesaid claims were valid claims. That at the time of the purported and pretended execution of each of the notes set forth in plaintiff's demand, John A. Thompson-Phoenix Finance Corporation controlled and dominated the Iowa-Wisconsin Bridge Company, its officers and directors, and said John A. Thompson at said time was president of the Iowa-Wisconsin Bridge Company, and of the Phoenix Finance Corporation, and that both he and other directors of the Phoenix Finance Corporation, who were also directors of the Bridge Company, were acting in a dual capacity against the interests of the Bridge Company when they [cause] the execution of said notes if said notes were executed. At the dates of said pretended notes and their claimed execution, the Phoenix Finance Corporation was indebted to the Bridge Company in far greater amount than the amount of said notes. That at that time it was indebted to the Bridge Company in the sum of $3,000 for checks of the Bridge Company of that amount given to A. B. Wilder at the time of the execution of the fraudulent $50,000 mortgage, without consideration, which $3000 had not been repaid to the Bridge Company. That the conspirators, John A. Thompson, Phoenix Finance Corporation, and Thompson & Company, were jointly and severally liable therefor, and said notes were offset by the $3000 thus wrongfully appropriated from the Bridge Company, and disbursed $2000 to A. B. Wilder, and $1000 check to Thompson & Company, and were further offset by the fact that the Phoenix Finance System, Inc. and its successor, the Phoenix Finance [fol. 634] Corporation, also owed the Bridge Company $14,000 with interest thereon from November 1930 for Bridge Company stock which it had received fraudulently without consideration, and charged to promotion, through the dominant control of John A. Thompson, and offset by other obligations and items due the Bridge Company from the Phoenix Finance Corporation and its predecessor. That at the date of said purported notes mentioned in plaintiff's demand, the Phoenix Finance Corporation was indebted to the Bridge Company in a far greater amount than the amount of said purported notes, and if at that time the Phoenix Finance Corporation made any payment to or put any funds into the account of the Bridge Com-

pany, it was merely a partial payment on what was due the Bridge Company from the Phoenix Finance Corporation, and did not furnish any basis or consideration for the execution of said purported notes, and said notes are without consideration, which fact was well known to the said John A. Thompson and the Phoenix Finance Corporation; that said purported notes are not under seal, and that said notes were never lawfully executed and delivered.

That all of the aforesaid acts and transactions were part and parcel of a plan, scheme and conspiracy on the part of the said John A. Thompson, and Phoenix Finance Corporation, and its predecessor and associates, and done with the fraudulent intent and purpose of cheating and defrauding the Bridge Company and its stockholders out of its property, and to acquire the ownership of said Bridge Company's property to the exclusion of the Bridge Company and its stockholders; and as a part of said fraudulent scheme and plan caused the bonds aforesaid to be issued and trust deed purported to secure the same to be executed without lawful consideration to the Bridge Company.

That the Phoenix Finance Corporation, at the time it was organized, was officered and controlled by the same officers as Phoenix Finance System, Inc. and took over the succession both of assets and liabilities, with full notice of the facts and circumstances surrounding the bond issue in [fol. 635] controversy in this case, and assumed the entire fruits and activities of its predecessor, so far as concerns this case, and proceeded to carry on with the same notice and purpose, adopting all of the plans and results of its predecessor.

That in the aforesaid trust deed securing the aforesaid bonds Bechtel Trust Company, an Io[illegible] a corporation (now First Trust & Savings Bank (and A. H. Schubert, a citizen of Wisconsin, were named as trustees, and on the 28th of August, 1933, filed a bill of foreclosure at the instance of the Phoenix Finance Corporation and with an arrangement that said suit would be instituted and prosecuted and the Phoenix Finance Corporation would save and keep harmless such trustees from all costs, expenses and liabilities, including attorneys' fees connected with the case. That said suit was filed in the United States District Court

for the Northern District of Iowa, in the name of Bechtel Trust Company, an Iowa corporation (now First Trust & Savings Bank) and A. H. Schubert, a citizen of Wisconsin, as trustees complainants, vs. Iowa-Wisconsin Bridge Company, a Delaware corporation, defendant, for the foreclosure of the aforesaid trust deed and bonds; that the aforesaid trust deed securing the aforesaid bond issue of $200,000 purportedly covered all of the property of the Iowa-Wisconsin Bridge Company.

The trust deed, which is in the ordinary form of a mortgage trust deed securing a bond issue, made it the duty of the Bridge Company to pay taxes on the mortgaged property, to pay interest on the bonds, and to pay the bonds as they matured. In case of default for a period of sixty (60) days it was provided that the trustees may, and upon the written request of the holders of twenty-five per cent of the bonds then in default, shall [declared] the principal of all the bonds due, and "shall proceed to protect and enforce their rights and the rights of the bondholders, under this Indenture by a suit or suits in equity, or at law * * by * * foreclosure hereunder, or for the enforcement of [fol. 636] any other appropriate legal or equitable remedy as the trustees * * shall deem most effectual."

It is further provided in the trust deed that no holder of any bond or coupon secured hereby shall have any right to institute any suit, action or proceeding in equity or law, for the foreclosure of this Indenture * * or for any other remedy hereunder, except in case the trustees after notice and demand refuse to act. The said suit was commenced by the trustees at the request of the Phoenix Finance Corporation as the holder of more than twenty-five per cent of the bonds, and was prosecuted by attorneys selected by it. The bill alleged jurisdiction based upon diversity of citizenship, the authority of the trustees to sue under the terms of the trust deed, default, and acceleration of due date, and the prayer was for foreclosure for all of the bonds, including those issued on or as collateral for the aforesaid notes mentioned in plaintiff's demand. The prayer was: "that an account be taken of the bonds and

interest coupons secured by said mortgage deed of trust, and the amount due on the said bonds for principal and interest or otherwise—that said Iowa-Wisconsin Bridge Company be decreed to pay the amount found due—within a short day to be fixed by the court, and that default of said payment the mortgaged property be sold to satisfy the amount found due and costs, and in case of such sale the defendant, Iowa-Wisconsin Bridge Company, and all persons claiming by, through or under it, may be forever barred or foreclosed of all equity of redemption," and prayed the appointment of a receiver, etc. A copy of the trust deed was attached to the bill in the usual form.

The defendant bridge company filed answer September 25, 1933, admitting the jurisdiction of the court, the execution of the trust deed and the issuance of the bonds; denying complainants' right to the appointment of a receiver; alleging that a part or all of the bonds secured by the trust deed were invalid; and praying the protection of the court. On September 26, 1933, the court appointed a receiver of all of the property of the Bridge Company [fol. 637] with direction to take immediate possession and to operate its business.

On December 5, 1933, by leave of court, Fayette D. Kendrick, a stockholder of the Bridge Company and citizen of Minnesota, intervened on behalf of defendant, himself and all other stockholders similarly situated, praying that the complainants' bill be dismissed, the bonds cancelled and the deed of trust set aside. He alleged that all of the bonds and the mortgage deed of trust were issued as a part of a fraudulent scheme, plan and conspiracy, with intent to cheat and defraud the Bridge Company and its stockholders out of their property. That the bonds and mortgage were fraudulent, without consideration, invalid and void, and were procured by John A. Thompson and his [associated] in conspiracy, officers and directors of the Phoenix Finance System, Inc., predecessor of petitioner, by dominating and controlling the Bridge Company and by acting as officers and directors of the latter. That none of the bonds had passed to innocent purchasers for value without notice. That the said John A. Thompson and his associates in conspiracy were still in control of the defendant Bridge Company and that demand by interveners

to obtain relief from or through said defendant corporation would be unavailing. On November 5, 1933, the court granted the intervention.

After the filing of the petition of intervention, which by order of court was permitted to stand as an answer in behalf of the defendant, Iowa-Wisconsin Bridge Company, the interveners moved the court for permission to bring in the Phoenix Finance Corporation, holder and owner of about ninety per cent of the outstanding bonds, as a co-plaintiff with the trustees. This motion was granted. Thereafter Phoenix Finance Corporation appeared and filed answer to the petition of intervention. The trustees [fol. 638] filed a more complete reply to the petition of intervention as amended. The trustees filed a resistance to interveners' application for the production of books and papers of Phoenix Finance Corporation. The Court entered an order that the Phoenix Finance Corporation produce all of its books and records pertaining to the business and affairs of the Iowa-Wisconsin Bridge Company, but such books, records and papers were never produced.

On December 3, 1934, all counsel for the parties agreeing, the court appointed a special master to hear all the issues and report his findings of fact and conclusions of law. The Master after taking the evidence, filed his report the 15th day of March 1936, to which all parties filed exceptions, including the Phoenix Finance Corporation. A hearing was had on the exceptions before the court and on the 1st day of December 1936 the court entered its decree: "that the mortgage and bonds in suit were fraudulently issued; that all bonds are without consideration with the exception of the bonds aggregating $15,000.00," which were specified, and those bonds were other than those held by Phoenix Finance Corporation, held by individuals.

That said holding determined that all of the bonds held by the Phoenix Finance Corporation were issued without consideration fraudulent and void and that the bonds issued as collateral to the notes mentioned in plaintiff's demand herein were without consideration and fraudulent and that said notes were without consideration.

That the considerations and matters relating to the purported notes set forth in plaintiff's demand, and the bonds

issued on said notes or as collateral for the payment thereof, and the considerations and other matters connected therewith, were fully litigated as part of the issues in said cause, and the court's decree that all bonds held by the Phoenix Finance Corporation were without consideration, and it has been determined by the Court that the alleged [fol. 639] notes mentioned in the demand were more than offset by what the Phoenix Finance Corporation owed the Bridge Company. That a copy of the court's decree is hereto attached, marked Exhibit "A" and made a part hereof. That the decision of the trial court was reported in 19 Federal Supplement, page 127. That from the decision of the trial court the complainants, including the Phoenix Finance Corporation, took an appeal to the Circuit Court of Appeals for the Eighth Circuit, and the Circuit Court of Appeals has rendered its opinion and order affirming the decision of the trial court, which is reported in 98 Federal (2d) 416.

That the Phoenix Finance Corporation filed a petition for certiorari in the United States Supreme Court, which was denied.

As to the claims for $15,000 and $7,000 respectively in this cause all the matters herein set forth are also asserted as defense to said claims.

That by reason thereof the alleged cause of action now demanded on by the plaintiff has been fully adjudicated and settled, by said judgment and decree, and the same is now res adjudicata, and the plaintiff, Phoenix Finance Corporation, is estopped from maintaining this action.

That it is claimed by the defendant, Bridge Company, that the alleged and pretended notes referred to in plaintiff's demand are barred by the statute of limitations.

IRENE M. BELL.

Sworn to and subscribed the day and year aforesaid before me.

(Notarial Seal)

F. T. BARRETT,
Notary Public in and for
Cerro Gordo County, Iowa.

My commission expires, July 4, 1942.

[fol. 640] (Note by the clerk of the District Court: The final decree of the District Court, dated December 1, 1936, which is made a part of original Exhibit SC-103, is omitted here because it is the same as Exhibit "C" which is a part of the Supplemental and Ancillary Bill of Complaint, and appears at folio pages 77 to 79 of this transcript.)

[fol. 641] In the Superior Court of the State of Delaware
In and For New Castle County.

Summons Case.

September Term, A. D. 1939.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 65. vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

Oct. 13, 1939. Defendant's attorney moves to stay proceedings until a final disposition of the cause pending in the District Court of the United States for the Northern District of Iowa. Argument on motion before Speakman, J. Briefs to be filed. On motion of D. Wolcott, Esq. and order of Court time for filing pleas extended to Nov. 20, 1939.

Nov. 13, 1939. Defendant pleads, with copy, to each count of Narr. Rule reps and issues by first general rule day in December.

[fol. 642] In the Superior Court of the State of Delaware
In and For New Castle County.

Summons Case.

September Term, A. D. 1939.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 65. vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

The defendant pleads to each and every count of the plaintiff's declaration as follows:

1. Non-assumpsit.
2. Statute of Limitations.
3. Payment.
4. Accord and satisfaction.
5. Set-off.
6. Release.
7. Res Adjudicata.

WARD and GRAY,
Attorneys for Defendant.

[fol. 643] In the Superior Court of the State of Delaware
In and For New Castle County.

Summons Case.

September Term, 1939.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 65. vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

Nov. 24, 1939. Plaintiff's attorney enters reps and issues to first and second pleas but declines to reply to the other pleas until the same are drawn out. Rule same drawn out by second general rule day in December.

[fol. 644] (Reply.)

In the Superior Court of the State of Delaware
In and For New Castle County.

September Term, 1939.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 65. vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

Phoenix Finance Corporation, the plaintiff above named, by Marvel, Morford & Logan, its attorneys, enters reps and issues to the defendant's first and second pleas, the same being the pleas of Non-assumpsit and Statute of Limitations but declines to reply to the defendant's third, fourth, fifth, sixth, and seventh pleas, the same being the pleas of Payment, Accord and Satisfaction, Set-off, Release and Res Adjudicata, until and unless said pleas be drawn out, and rules that said pleas be drawn out by the next general rule day.

MARVEL, MORFORD & LOGAN,
Attorneys for Plaintiff.

[fol. 645] In the Superior Court of the State of Delaware
In and For New Castle County.

September Term, A. D. 1939.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 65. vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

Dec. 7, 1939. Defendant files drawn out seventh plea. Rule reps and issues by first general rule day in January.

[fol. 646] Plea of Res Adjudicata.

In the Superior Court of the State of Delaware
In and For New Castle County.

September Term, A. D. 1939.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 65. vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

Now comes the defendant, by Ward and Gray, its attorneys, and pursuant to the direction of the plaintiff here-

with draws out its seventh Plea heretofore filed in this action, by filing the following seventh plea;

7. And for a further plea to each and every count of the said declaration filed by the plaintiff, the defendant, by its said attorneys, says Actio Non because the defendant says that the subject matter of the plainitff's said suit is res adjudicata, in that on or about the fifth day of January, A. D. 1937, in a certain cause pending in the United States Distric Court for the Northern District of Iowa, between the plaintiff in the above entitled cause as one of the complainants, and the defendant in the above entitled cause as one of the defendants, entitled "First Trust and Savings Bank (formerly Bechtel Trust Company) and A. H. Schubert, as Trustees, and Phoenix Finance Corporation, Complainants, vs. Iowa-Wisconsin Bridge Company and Fayette D. Kendrick, et al., interveners," a decree was entered in said United States District Court for the Northern District of Iowa, being a Court having jurisdiction of the parties and subject matter therein, in favor of the said Iowa-Wisconsin Bridge Company and against the complainants therein, after a hearing on the merits; that, thereafter, to-[fol. 647] wit, on or about the eighth day of August, A. D. 1938, a decree affirming the decree of the said United States District Court for the Northern District of Iowa was entered by the Circuit Court of Appeals of the United States, Eighth Circuit, after hearing said cause on appeal from the United States District Court for the Northern District of Iowa; that, thereafter, to-wit, at the October Term, A. D. 1938, the Supreme Court of the United States denied a petition for certiorari seeking to review the decree of affirmance of the Circuit Court of Appeals of the United States, Eighth Circuit; that the plaintiff in the above entitled cause is the same party as the complainant Phoenix Finance Corporation in said action in the United States District Court for the Northern District of Iowa and is acting in the same capacity; that the issues in the above entitled cause are identical with issues decided against said plaintiff in said action in the United States District Court for the Northern District of Iowa; and that said decree rendered in the United States District Court for the Northern District of Iowa, is still in full force and effect, and this the defendant is ready to verify.

WARD and GRAY,
Attorneys for Defendant.

[fol. 648] In the Superior Court of the State of Delaware
In and For New Castle County.

September Term, 1939.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 65. vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

Dec. 26, 1939. Plaintiff files replication to seventh plea. Rule rejoinder by second general rule day in January.

[fol. 649] (Replication.)

In the Superior Court of the State of Delaware
In and For New Castle County.

September Term, 1939.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 65. vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

Now Comes the plaintiff, by Marvel, Morford & Logan, its attorneys, and as to the seventh plea of the defendant heretofore filed and drawn out in the above stated cause says precludi non, because it says that the issues in the above entitled cause are not identical with issues decided against the plaintiff in said action in the United States District Court for the Northern District of Iowa, that the plaintiff was not such a party to said cause that a valid adjudication could be made against it, and that the said United States District Court for the Northern District of Iowa, was without jurisdiction to adjudicate against the plaintiff

on any issue involved in the above stated cause, and of this the said plaintiff puts itself upon the country.

MARVEL, MORFORD & LOGAN
Attorneys for Plaintiff.

Filed in the District Court March 20, 1940.

[fol. 650] (Exhibit SC-104.)

State of Delaware,
New Castle County,—ss.:

I, Martin G. Hannigan, Prothonotary of the Superior Court of the State of Delaware, in and for New Castle County, do hereby certify that the foregoing pages contain a true copy of the whole Record and Proceedings in the case there stated as the same now remains in the Superior Court of the said State, at Wilmington.

In testimony whereof, I hereunto set my hand and affix the seal of the said Court, this Seventh day of March A. D. One thousand nine hundred and forty.

(Seal)

MARTIN G. HANNIGAN,
Prothonotary.

State of Delaware, to-wit:—

I, Daniel J. Layton, Chief Justice of the State of Delaware, and as such, the Presiding Judge of the Superior Court of the said State, do hereby certify that the foregoing Record and attestation, made by Martin G. Hannigan, Esq., Prothonotary of the said Court, within the County of New Castle, whose name is thereto subscribed, and to which the seal of said Court is affixed, are in due form, and made by the proper officer.

In testimony whereof, I hereunto set my hand, this Seventh day of March, A. D. One thousand nine hundred and forty.

DANIEL J. LAYTON,
Chief Justice.

[fol. 651] State of Delaware,
New Castle County,—ss.:

I, Martin G. Hannigan, Prothonotary of the Superior Court of the State of Delaware, in and for the

County of New Castle, do certify that the Honorable Daniel J. Layton, Esquire, by whom the foregoing attestation was made, and whose name is thereto subscribed, was at the time of making thereof, and still is, Chief Justice of the State of Delaware, and, as such, the Presiding Judge of the Superior Court of the said State, duly commissioned and sworn, to all whose acts, as such, full faith and credit are, and ought to be, given, as well in Courts of Justice as elsewhere.

In testimony whereof, I hereunto set my hand and affix the seal of the said Court, this Seventh day of March, A. D. One thousand nine hundred and forty.

MARTIN G. HANNIGAN,
Prothonotary.

[fol. 652] In the Superior Court of the State of Delaware
In and For New Castle County.

September Term, 1939.

Summons Covenant.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 64. vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

Please issue summons covenant to the September Term, A. D. 1939.

MARVEL, MORFORD & LOGAN,
Attorneys for Plaintiff.

To Martin G. Hannigan, Prothonotary, June 21, 1939.

Filed Jun. 21, 4:12 P. M. Martin G. Hannigan, Prothonotary.

[fol. 653] Sum Case.

New Castle County,—ss.:

The State of Delaware,

Seal To the Sheriff of New Castle County,—Greeting:

We Command You, That you summon Iowa-Wisconsin Bridge Company a corporation duly organized and existing under the laws of the State of Delaware, late of your County Company so that it be and appear before the Judges of our Superior Court at Wilmington, on Monday, the Eighteenth day of September next to answer Phoenix Finance Corporation a corporation duly organized and existing under the laws of the State of Delaware of a plea that it hold and keep with it the covenant between them made according to the force and effect of certain articles of agreement between them and &c.

And Have you then and there this Writ.

Witness, the Honorable Daniel J. Layton, at Wilmington, the First day of May in the year of our Lord one thousand nine hundred and thirty-nine.

Issued Jun. 22, 1939.

MARTIN G. HANNIGAN,
Prothonotary.

[fol. 654] .176 Superior.

Sept. Term, A. D. 1939.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 64. vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

Sum Covenant

MM & L, Esqs.

Pro.q

Summoned Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware, by serving a copy of the within writ

upon Charles S. Peabbleo, Assistant Secretary of the Corporation Trust Company, said Corporation Trust Company, being Resident Agent in the State of Delaware for the said Iowa-Wisconsin Bridge Company, a corporation as aforesaid, on the twenty-third day of June, A. D. 1939. The President or other head officers of the said Iowa-Wisconsin Bridge Company, a corporation as aforesaid, not being found within the State of Delaware.

So Ans.

SAMUEL M. FORD,
Sheriff.

Cost	.75	In Sheriff's Hands
Mlg	.10	Jun 23 905 AM '39
	.85	New Castle County

Service Accepted 6-23-39, 11:10 AM.

(CHARLES) PEABBLEO,
Asst. Secy, Corp. Tr. Co.

[fol. 655] In the Superior Court of the State of Delaware
In and For New Castle County.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware, M. M. & L.

No. 64. vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware. W. & G.

Sept. 11, 1939. Ward & Gray enter appearance for deft.

September 18, 1939. Narr filed, copy delivered. Rule pleas by first general rule day in October.

[fol. 656] In the Superior Court of the State of Delaware
In and For New Castle County.

September Term, 1939.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 64. vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

New Castle County:—ss.:

Iowa-Wisconsin Bridge Company, a corporation of the State of Delaware, the defendant in this suit, was summoned to answer Phoenix Finance Corporation, a corporation of the State of Delaware, the plaintiff in this suit, of a plea of breach of covenant, and thereupon the said plaintiff, by Marvel, Morford & Logan, its attorneys, complains:

For That Whereas, heretofore, to-wit, on the 10th day of November, A. D. 1930, at Hennepin County, State of Minnesota, to-wit, at New Castle County aforesaid, by a certain indenture or agreement in triplicate then and there made between Phoenix Finance System, Inc., a corporation of the State of Delaware, of the one part, John W. Shaffer & Company, a body corporate, of the second part, and the defendant of the third part, one part of which said indenture or agreement in triplicate, sealed with the seals of the parties thereto, including the defendant, the said plaintiff now brings into Court, the date whereof is the day and year aforesaid, the said parties thereto covenanted and agreed each with the other in words and figures as follows, to-wit:

"This agreement made and entered into in triplicate by and between Phoenix Finance System, Inc., first party, and John W. Shaffer & Company, second party, and Iowa-Wisconsin Bridge Company, third party, witnesseth:

[fol. 657] Whereas, First party has large financial means, Second party has contracted to build the Black Hawk Bridge at Lansing, Iowa and the Third party is owner of the Black Hawk Bridge, and

Whereas, endorsements are necessary and valuable in the making of labor and material contracts, now therefore,

In consideration of one hundred forty (140) shares stock of the Iowa-Wisconsin Bridge Company in hand, paid by Third party, receipt of which is hereby acknowledged by First party and in consideration of the premises and provisions of this agreement, the First party does hereby agree to and by other endorsements does guarantee the cash payments required to be paid by the Second party to McClintic Marshall Co. of Pittsburg and Industrial Contracting Company of Minneapolis according to contracts with said companies providing for work and material to build the Black Hawk Bridge at Lansing, Iowa.

In consideration of the premises and the values accruing to Second party from said guarantees by First Party, the Second party hereby agrees to meet and pay promptly when due all payments guaranteed by First party and Second party further agrees that it will pay on demand to First party any sums First party may be required to advance by reason of any of the endorsements or guarantees in connection with the building of the said Black Hawk Bridge.

In consideration of the premises and the benefits to Third party, by reason of any endorsements or guarantees of First party, the Third party hereby agrees that in event Second party fails to pay and discharge all of the payments aforesaid and/or first party is required to advance any sums of money by reason of any endorsement or guarantee in connection with the financing of the said Black Hawk Bridge then and in that event the Third party agrees to pay to First party on demand a sum equal to the total amount due to First party from all causes in connection with said financing of said bridge.

It is agreed by all parties hereto that in addition to the principal sum, interest at the rate of 8% per annum will accrue and be payable upon and with all sums remaining unpaid to First party after March 1st, 1931, and that all sums advanced by First party hereunder shall become payable to First party on demand.

Second party agrees to provide a Standard Completion Bond, guaranteeing Completion of the Bridge, Premium to be paid by First party.

It is agreed that First party may have access to all the books and records of Second and Third parties at any and all reasonable times for the purpose of inspecting and observing the progress of the work on the bridge and the payments therefor,

Third party agrees that First party may take over possession of and control of the Black Hawk Bridge and all work and management of all things in connection therewith [fol. 658] at any time during any default of or any failure of Third party to promptly meet any payments therein required of it to be made and that First party may have and hold said Bridge and all things belonging thereto until said sums are paid in full as required thereunder.

Executed and entered into for the respective corporations by their duly authorized officers at Minneapolis, Minnesota this 10th day of November, 1930.

PHOENIX FINANCE SYSTEM, INC.
By J. A. Thompson, President.

(Corporate Seal)

JOHN W. SHAFFER & COMPANY,
By John W. Shaffer, President.

(Corporate Seal)

IOWA-WISCONSIN BRIDGE COMPANY,
By C. W. O'Connor,
Chairman of the Board.

(Corporate Seal)

Attest:

M. K. THOMPSON, Secretary.
A. U. HARTING, Secretary.
M. E. LOCKHART, Secretary.

That in and by said agreement and for the considerations therein mentioned, Phoenix Finance System, Inc. agreed to and did thereby guarantee the cash payments required to be made by John W. Shaffer & Company to McClintic Marshall Co. of Pittsburg, and Industrial Contracting Company of Minneapolis, according to certain existing contracts between said John W. Shaffer & Company as principal contractor and said companies providing for labor and/or materials to build the Black Hawk Bridge at

Lansing, Iowa, owned by the defendant; that the said John W. Shaffer & Company in and by said agreement covenanted and agreed to meet and pay promptly when due all payments thus guaranteed by Phoenix Finance System, Inc. and to pay on demand to the said Phoenix Finance System, Inc. any sums that it might be required to advance by reason of its guarantees in connection with the building of said Black Hawk Bridge; and that the defendant, in consideration of the premises and the benefits to it, in and by said agreement covenanted and agreed that in the event John W. Shaffer & Company failed to pay and discharge all of the payments aforesaid and/or Phoenix Finance Sys-[fol. 659] tem, Inc. should be required to advance any sums of money by reason of any endorsement or guarantee in connection with the financing of said Black Hawk Bridge, that it, the said defendant, would pay to Phoenix Finance System, Inc. on demand a sum equal to the total amount due said Phoenix Finance System, Inc. from all causes in connection with the said financing of said Bridge, together with interest at the rate of 8% per annum upon all sums remaining unpaid to the said Phoenix Finance System, Inc. after March 1, 1931.

And the said plaintiff further says that a statute of the State of Minnesota in full force and effect at all the times herein mentioned, the same being Chapter 70, Laws of Minnesota, 1923, provided as follows:

"The interest for any legal indebtedness shall be at the rate of six dollars upon one hundred dollars for a year, unless a different rate is contracted for in writing; and no person shall directly or indirectly take or receive in money, goods, or things in action, or in any other way, any greater sum, or any greater value, for the loan or forbearance of money, goods, or things in action, than eight dollars on one hundred dollars for one year; and in the computation of interest upon any bond, note, or other instrument or agreement interest shall not be compounded, but any contract to pay interest, not usurious, upon interest overdue, shall not be construed to be usury. Contracts shall bear the same rate of interest after they become due as before, and any provision in any contract, note, or instrument providing for

an increase of the rate of interest after maturity, or any increase therein after making and delivery, shall work a forfeiture of the entire interest; but this provision shall not apply to notes or contracts which bear no interest before maturity."

And the said plaintiff further says that prior to the making of said agreement as aforesaid, a certain contract in writing had been entered into between the said John W. Shaffer & Company and McClintic-Marshall Co. dated November 8, 1930, in connection with which the payments due McClintic-Marshall Co. from John W. Shaffer & Company had been guaranteed by the said Phoenix Finance System, Inc.; that said contract and the guarantee of Phoenix Finance System, Inc. was in words and figures as follows, to-wit:

[fol. 660] "McClintic-Marshall Company
Steel Bridges, Buildings, etc.
General Offices, Pittsburg, Pa.

1416 First National Bank Building
Chicago, Ill., Nov. 8, 1930.

Proposal-Contract
D-2945

To John W. Shaffer & Company, Minneapolis, Minn.

(Hereinafter called the "Purchaser")

The McClintic-Marshall Company, a Delaware Corporation hereinafter called the "Contractor," proposes, subject to the conditions herein, To Furnish and Deliver, f. l. b. cars its works with carload rate of freight allowed to Lansing, Iowa, the structural steelwork only for the Blackhawk Bridge at Lansing, Iowa, as shown on two unnumbered prints furnished by the Purchaser, and as further amplified by Purchaser's detail drawings #1 to 17 inclusive.

Trusses for cantilever arms and anchor arms will be subpunched and reamed. All other work will be full sized punched work.

The contractor shall have the privilege of substituting equivalent sections for those specified, subject to approval of the Engineer of Bridge Co.

The price quoted herein is based on the present freight rate. Should this rate be increased before shipment, amount of the increase is to be paid for by the Purchaser.

Material shall be routed as the Purchaser directs, provided such routing entails no additional cost to the Contractor.

Shop Paint: One (1) coat brown Nocoro.

Price: The Purchaser shall pay the Contractor in funds current at par in New York or Pittsburg for the said work, labor, services, and materials the sum of Seventy-three Dollars and fifty cents ($73.50) per ton of 2000 pounds.

Price is exclusive of all spotting, switching, or other delivery charges at destination.

Terms of Payment: On or about the last of each calendar month an estimate shall be made by the Contractor of the value of material received and of work fabricated and ready for shipment up to that time, which estimate shall be due and payable on the tenth (10th) of the month following.

If payments are based on unit weights, the total weight shall be calculated in accordance with the Code of Standard Practice of the American Institute of Steel Construction, Inc.

[fol. 661] Information to Be Furnished by Purchaser: The Purchaser agrees to furnish within 30 days from date of acceptance of this Proposal, complete information necessary for ordering material and preparation of the shop drawings. Information for any provision in the structural steelwork for other trades is to be furnished in such time as not to interfere with the preparation of the shop drawings.

Completion: The Contractor agrees to complete the shipment of the 90′ deck truss spans six (6) weeks after date of receipt of completely checked shop detail drawings, and to complete shipment of the entire work within ten (10) weeks after date of receipt of completely checked detail drawings by the Contractor, provided above information is furnished within the time above stipulated and that the Contractor is not delayed by strikes, fires, floods,

storms, rolling mills, transportation, acts of civil or military authorities or other causes beyond his control.

No claims will be allowed for correction of alleged misfits unless notification is given the Contractor at the time and responsibility is proven. Ordinary inaccuracies of shop work are not to be considered misfits.

Yours very truly,

McCLINTIC-MARSHALL COMPANY,
C. H. HARLAN,
Resident Contracting Manager.

Accepted:

JOHN W. SHAFFER & COMPANY,
By John W. Shaffer,

Date: November 8, 1930.

The payments for this work are hereby guaranteed by the Phoenix Finance System, Inc., a Delaware corporation.

PHOENIX FINANCE SYSTEM, INC.,
By J. A. Thompson, President.

Date: November 8, 1930."

And the said plaintiff further says that after the making of said agreement as aforesaid, a certain contract in writing was entered into between the said John W. Shaffer & Company and Industrial Contracting Company dated November 11, 1930, in connection with which the payments due Industrial Contracting Company from John W. Shaffer & Company were guaranteed by the said Phoenix Finance [fol. 662] System, Inc.; that said contract and the guarantee of Phoenix Finance System, Inc. was in words and figures as follows, to-wit:

"This Agreement, made and executed this 11th day of November, 1930, by and between Industrial Contracting Company, a corporation organized under the laws of the State of Minnesota, hereinafter referred to as 'Sub-Contractor,' party of the first part, and John W. Shaffer & Company, a corporation organized under the laws of the State of Minnesota, hereinafter referred to as 'Contractor,' party of the second part,

Witnesseth:

That Whereas, John W. Shaffer & Company on the 11th day of November, 1930, entered into a contract with Iowa-Wisconsin Bridge Company, a Delaware corporation, for the construction of the superstructure of a bridge across the Mississippi River between Lansing, Iowa and a point approximately two miles South of DeSoto, Wisconsin, said bridge being known as the 'Black Hawk Bridge,' and

Whereas, said John W. Shaffer & Company desires to sublet to Industrial Contracting Company the contract for the completion of said bridge, and

Whereas, the completion of said bridge shall be considered as comprising the erecting of the steel superstructure extending from Pier No. 1 to Pier No. 9, together with floor system, furnishing material for an erecting pile trestles over Henderson, Indian, Stevens, Winneshiek and Big Sloughs, furnishing material for an erecting toll house and greasing pit at Lansing and of bridge (but not including any equipment for storing or handling gas or oil);

Now, Therefore, This Agreement Witnesseth:

That the sub-contractor agrees to erect for the contractor the foregoing in accordance with the plans and specifications hereto attached and made a part hereof and said contractor in consideration thereof agrees to pay said sub-contractor an amount equal to cost plus fifteen per cent; provided, however, that based on the quantities herein stated, the sub-contractor agrees that the maximum cost to the contractor shall not exceed the sum of One Hundred Forty-one Thousand Seven Hundred Thirty-four ($141,734.00) Dollars.

In the event that the cost plus fifteen per cent shall be less than the guaranteed maximum cost of $141,734.00, then the sub-contractor shall receive additional compensation equal to one-half of the difference between the actual cost plus fifteen per cent, and said guaranteed maximum cost of One Hundred Forty-one Thousand Seven Hundred Thirty-four Dollars ($141,734.00).

It is Understood And Agreed that the quantities on which the guaranteed maximum cost is based and the unit

prices to be applied to additions or deductions in quantities, in case there is a variation in same and therefore it becomes necessary to increase or decrease the guaranteed maximum cost, are as follows:

[fol. 663] 1400 tons of steel (erection only)— per ton	$29.00
Piling in place....11514 Lineal ft. at	.65
Timber in place....449,754 FBM at	60.00 per M
Asphalt floor....39,325 sq. ft. at	0.103
Concrete....372 cu. yds. at	14.00

In case the actual quantities vary from those stated herein, the guaranteed maximum cost shall be increased or decreased accordingly, and the guaranteed maximum cost so computed shall be used in place of One Hundred Forty-one Thousand Seven Hundred Thirty-four Dollars (141,734.00) in determining the compensation due the sub-contractor.

The contractor agrees to pay the sub-contractor Seven Thousand Dollars ($7,000.00) on the signing of this agreement, and on the 1st and 15th day of each month thereafter to make payment to sub-contractor as called for by estimates approved by the engineer for the Iowa-Wisconsin Bridge Company, and such estimates shall cover all expenditures and commitments made by the sub-contractor during the preceding semi-monthly period which are chargeable to the cost of the work. The contractor also agrees to pay to the sub-contractor within fifteen days after the completion of the work, and approval of the same by the engineer for the Iowa-Wisconsin Bridge Company, and on proof that all bills are paid, an amount equal to the difference between the sum of the payments already made and the total payments due the sub-contractor under the terms of this agreement.

Extras shall be ordered in writing and the sub-contractor shall be paid for same either an agreed price, stated in the order, or cost plus fifteen per cent.

The Sub-contractor shall secure all necessary workmen's compensation and public liability insurance. It is understood and agreed that the cost of the work shall include the cost of such insurance, the cost of the sub-contractor's bond, and all necessary labor, material, lumber, timber, falsework, working trestle, fuel, insurance, rental of

equipment and tools, freight to and from job, temporary buildings and such other items as are customarily considered as part of the cost in carrying out a contract of this nature, but shall be exclusive of general office overhead.

The sub-contractor covenants and agrees to furnish to the contractor as soon after the execution of this contract as is reasonably possible, a detailed statement showing its estimated cost hereunder. The sub-contractor further agrees that the contractor shall have the right to inspect and audit the books of the sub-contractor, pertaining to the work done under the contract, and the cost thereof, at all reasonable times.

It is Understood and Agreed that, if previous to the completion of this contract, the contractor shall at any time fail to make payments to the sub-contractor as heretofore specified, and continues in default ten (10) days after receiving written notice to perform, then the sub-contractor shall be relieved from any further obligation hereunder; provided, however, that for all work theretofore done the sub-contractor shall be entitled to be paid on a basis of cost, plus fifteen per cent, as hereinbefore provided.

[fol. 664] It is Further Agreed that in figuring the cost of work performed, the following schedule of equipment rentals shall be applied:

Clam Sheel—	$ 2.50 per day
Derrick including hoisting engine and boiler	7.50 per day
Pile hammer	2.50 per day
Concrete mixer and small concrete tools—	.40 per cu. yd.
Small tools for steel work	$ 1.00 per ton steel
Compressor	10.00 per day
Pump	4.00 per day
Locomotive crane	$25.00 per day
Heavy timber tools	$ .50 per F.B.M.

Any equipment not listed above but found needed during construction will be charged to job at rental value governed by schedule established by Associated General Contractors of America.

Said contractor also agrees to furnish promptly to said sub-contractor such complete and reasonably detailed plans

as the sub-contractor finds needed for the intelligent and rapid prosecution of the work. Said contractor also agrees to provide all field engineering, lines and grades.

Said contractor will, at its own expense, procure all necessary licenses, permits, franchises and rights of way. Said sub-contractor agrees to furnish a surety bond hereunder, the expense of the same to be included in the cost of the work.

The sub-contractor agrees to start work within three (3) days after the signing of this contract and the receipt from the contractor of the initial payment herein specified.

The sub-contractor agrees to proceed with the work so as to permit traffic over the bridge by March 10, 1931, provided that the shipping dates of the steel—which is to be furnished and paid for by the contractor—are such as to permit the completion of the work by said date under the weather conditions which are then found to exist.

It Is Mutually Agreed that this agreement comprises the entire contract between the parties hereto, and that there are no representations or agreements by either party except as set forth in said contract.

In Witness Whereof, the parties hereto have caused these presents to be executed in their corporate names, by their proper officers thereunto duly authorized by resolutions of the Board of Directors of said corporations, certified copies of which resolutions are hereto attached.

INDUSTRIAL CONTRACTING COMPANY,
By A. F. Crounse, Its: Pres.
Attest:
R. G. McGrail, Its: Secy.

[fol. 665] In presence of:

B. M. Storey,
E. McGrail.

JOHN W. SHAFFER COMPANY,
By John W. Shaffer, Its: Pres.
Attest:
W. W. Harting, Its: Secy.

M. White,
Selma Holmberg.

In Consideration of the sum of One Dollars ($1.00) and other valuable consideration to it in hand paid by Industrial Contracting Company, and in order to induce said Industrial Contracting Company to enter into the attached contract between said Industrial Contracting Company and John W. Shaffer & Company, Phoenix Finance System, inc., a corporation organized under the laws of the State of Delaware, does hereby guarantee, promise and agree to and with said Industrial Contracting Company that said John W. Shaffer & Company will faithfully and promptly pay all sums of money by it to be paid as set forth in the attached contract, at the times and in the manner therein provided. Said Phoenix Finance System, Inc., expressly waives the making of any demand by said Industrial Contracting Company on said John W. Shaffer & Company for said payments, or any of them, and any notice of non-payment on the part of said John W. Shaffer & Company, it being the intention of said Phoenix Finance System, Inc., by the execution of this guarantee, to make itself liable for all payments to be made by said John W. Shaffer & Company to said Industrial Contracting Company under the attached contract in exactly the same manner as John W. Shaffer & Company is itself liable for said payments under the said terms of said contract.

In Testimony Whereof, the said Phoenix Finance System, Inc., has caused these presents to be executed in its corporate name, by its proper officers thereunto authorized, and its corporate seal to be hereunto affixed this 10 day of November, 1930.

PHOENIX FINANCE SYSTEM, INC.,
By J. H. Thompson, Its Pres.
Attest:
M. K. Thompson, Its Secy.

(Corporate Seal)

Witnesses:
John W. Shaffer.

Certificate.

I, M. K. Thompson, Secretary of Phoenix Finance System, Inc., do hereby certify that a special meeting of the Board of Directors of said corporation was held on the

10th day of November, 1930, of which meeting due notice was given to the members of said Board of Directors, and at which meeting a quorum of said Board was present, and the following resolution was unanimously adopted:

[fol. 666] Resolved: That a certain contract between Phoenix Finance System, Inc. and the Industrial Contracting Company, providing for guaranteeing payment of certain sums covered by a certain agreement between the Industrial Contracting Company and John W. Shaffer & Company bearing date November 10, 1930, and providing for the construction of the superstructure of the Black Hawk Bridge, be and the same is hereby approved, and the President and Secretary of this corporation are hereby authorized and directed to execute said contract on behalf of this corporation and to do all things necessary to put same into effect and consummation.

Signed this 10th day of November, A. D. 1930.

M. K. THOMPSON,
Secretary,
Phoenix Finance System, Inc."

And the said plaintiff further says that the agreement of November 10, 1930, and the covenants and promises of the said Phoenix Finance System, Inc. therein contained, was and were with reference inter alia to the guarantees of the said Phoenix Finance System, Inc. of the aforesaid contracts between John W. Shaffer & Company and McClintic-Marshall Co. and Industrial Contracting Company respectively.

And the said plaintiff further says that John W. Shaffer & Company failed to pay and discharge its obligations under the aforesaid contracts and that, in pursuance of its obligations as guarantor of said contract, Phoenix Finance System, Inc. advanced to the defendant, for the express purpose of meeting and paying said obligations, in cash and marketable bonds of the United States of America, sums aggregating Twenty-one Thousand Two Hundred Sixty-two Dollars and Seventy one cents ($21,262.71), lawful money of the United States of America, and that said sums were so advanced by said Phoenix Finance System, Inc. to the defendant and were used by the defendant with

the consent and at the direction of Phoenix Finance System, Inc. for the purpose of paying the obligations of John W. Shaffer & Company under the aforesaid contracts to McClintic-Marshall Co. and Industrial Contracting Company. Wherefore the said plaintiff says that in pursuance of the covenants and promises of Phoenix Finance System, [fol. 667] Inc. under the agreement of November 10, 1930, said Phoenix Finance System, Inc. was required to advance and pay, and did advance and pay, by reason of its endorsements or guarantees in connection with the building of said Black Hawk Bridge the said sum (in cash or marketable bonds of the United States of America) of Twenty-one Thousand Two Hundred Sixty-two Dollars and Seventy-one Cents ($21,262.71), lawful money as aforesaid.

And the said plaintiff further says that thereafter, to-wit, on the 1st day of January, 1932, the said Phoenix Finance System, Inc. assigned, transferred and set over to the plaintiff all of its assets, including accounts receivable and choses in action, and that the plaintiff purchased the said assets of the said Phoenix Finance System, Inc. for a valuable consideration and agreed to assume the liabilities of Phoenix Finance System, Inc., whereby the said plaintiff became vested and still is vested with all of the rights of Phoenix Finance System, Inc. under said agreement of November 10, 1930.

And the said plaintiff further says that John W. Shaffer & Company, in violation of the covenants and agreements on its part to be performed as aforesaid, has wholly failed to pay either to Phoenix Finance System, Inc. or to the plaintiff the sums that Phoenix Finance System, Inc. was required to advance by reason of its guarantees as aforesaid, or any part thereof, or any interest thereon, although often requested and demanded so to do.

And although said Phoenix Finance System, Inc., prior to the first day of January, 1932, and the said plaintiff since that date, have always from the time of the making of said agreement hitherto well and truly performed, fulfilled and kept all things in said agreement contained on their art and behalf to be performed, fulfilled and kept, [fol. 668] according to the tenor and effect, true intent and meaning thereof, yet protesting that the said defend-

ant has not performed, fulfilled or kept anything in said agreement contained on its part and behalf to be performed, fulfilled and kept, according to the tenor and effect, true intent and meaning thereof, the said plaintiff says that after the making of said agreement as aforesaid and after the payments by Phoenix Finance System, Inc. for the purpose of discharging its guarantees as aforesaid, the said defendant, although often demanded so to do, has hitherto wholly failed and refused and still does fail and refuse to pay to Phoenix Finance System, Inc. prior to January 1, 1932, or to the plaintiff since that date, the said sum of Twenty-one Thousand Two Hundred Sixty-two Dollars and Seventy-one Cents ($21,262.71) together with interest thereon at the rate of 8% per annum from March 1, 1931, contrary to the tenor and effect, true intent and meaning of said agreement and of the covenants of the said defendant in that behalf so made as aforesaid.

And so the plaintiff in fact says that the said defendant (although often requested so to do) has not kept the said covenants so made by it as aforesaid but has broken the same, and to keep the same with the said Phoenix Finance System, Inc. and with the plaintiff as the assignor of Phoenix Finance System, Inc., has hitherto wholly neglected and refused, and still doth neglect and refuse, to the damage of the said plaintiff in the sum of Fifty Thousand Dollars ($50,000.00), lawful money of the United States of America, and therefore it brings its suits, &c.

MARVEL MORFORD & LOGAN,
Attorneys for Plaintiff.

[fol. 669] Agreement Sued Upon in This Action

Agreement

This agreement made and entered into in triplicate by and between Phoenix Finance System, Inc., first party, and John W. Shaffer & Company, second party, and Iowa-Wisconsin Bridge Company, third party, witnesseth:

Whereas, First party has large financial means, Second party has contracted to build the Black Hawk Bridge at Lansing, Iowa and the Third party is owner of the Black Hawk Bridge, and

Whereas endorsements are necessary and valuable in the making of labor and material contracts, now therefore,

In consideration of one hundred forty (140) shares stock of the Iowa-Wisconsin Bridge Company in hand, paid by Third party, receipt of which is hereby acknowledged by First party and in consideration of the premises and provisions of this agreement, the First party does hereby agree to and by other endorsements does guarantee the cash payments required to be paid by the Second party to McClintic-Marshall Co. of Pitsburg and Industrial Contracting Company of Minneapolis according to contracts with said companies providing for work and material to build the Black Hawk Bridge at Lansing, Iowa.

In consideration of the premises and the values accruing to Second party from said guarantees by First party, the Second party hereby agrees to meet and pay promptly when due all payments guaranteed by First party and Second party further agrees that it will pay on demand to First party any sums First party may be required to advance by reason of any of the endorsements or guarantees in connection with the building of the said Black Hawk Bridge.

In consideration of the premises and the benefits to Third party, by reason of any endorsements or guarantees of First party, the Third party hereby agrees that in event [fol. 670] Second party fails to pay and discharge all of the payments aforesaid and/or first party is required to advance any sums of money by reason of any endorsement or guarantee in connection with the financing of the said Black Hawk Bridge then and in that event the Third party agrees to pay to First party on demand a sum equal to the total amount due to First party from all causes in connection with said financing of said bridge.

It is agreed by all parties hereto that in addition to the principal sum, interest at the rate of 8% per annum will accrue and be payable upon and with all sums remaining unpaid to First party after March 1st, 1931, and that all sums advanced by First party hereunder shall become payable to First party on demand.

Second party agrees to provide a Standard Completion Bond guaranteeing completion of the Bridge, Premium to be paid by First party.

It is agreed that First party may have access to all the books and records of Second and Third parties at any and all reasonable times for the purpose of inspecting and observing the progress of the work on the bridge and the payments therefor.

Third party agrees that First party may take over possession of and control of the Black Hawk Bridge and all work and management of all things in connection therewith at any time during any default of or any failure of Third party to promptly meet any payments herein required of it to be made and that First party may have and hold said bridge and all things belonging thereto until said sums are paid in full as required hereunder.

Executed and entered into for the respective corporations [fol. 671] by their duly authorized officers at Minneapolis, Minnesota this 10 day of November, 1930.

Corporate Seal

PHOENIX FINANCE SYSTEM, INC.,
By J. A. Thompson,
President.

Attest

M. K. Thompson,
Secretary.

JOHN W. SHAFFER & COMPANY,
By John W. Shaffer,
President.

Corporate Seal

A. U. Harting,
Secretary.

IOWA-WISCONSIN BRIDGE COMPANY,
By C. W. O'Connor,
Chairman of the Board.

Corporate Seal

M. E. Lockhart,
Secretary.

[fol. 672] In the Superior Court of the State of Delaware in and for New Castle County.

September Term 1939.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 64. vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

October 18, 1939. Defendant's attorney moves to stay proceedings until a final disposition of the cause pending in the District Court of the United States for the Northern District of Iowa. Argument on motion before Speakman, J. Briefs to be submitted.

On motion of D. Wolcott, Esq., and order of Court, time for filing pleas extended to November 20, 1939.

November 20, 1939. On motion of Defendant's attorney and order of Court, time for filing pleas further extended to January 2, 1940.

January 2, 1940. Defendant pleads, with copy, to Narr. Rule reps and issues by first general rule day in February.

[fol. 673] In the Superior Court of the State of Delaware in and for New Castle County

September Term, 1939.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 64. vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

Now Comes the defendant, Iowa-Wisconsin Bridge Company, the defendant above named, by Southerland, Berl, Potter & Leahy, its attorneys, and files the following pleas to each and every count of the plaintiff's declaration filed herein:

1. Non est factum.

2. Payment.

3. Set-off.

4. Statute of Limitations.

5. And for a further plea to each and every count of the said declaration filed by the plaintiff, the defendant, by its said attorneys, says, Actio Non, because the defendant says that the subject matter of the plaintiff's said suit is res adjudicata, in that on or about the fifth day of January, A. D. 1937, in a certain cause pending in the United States District Court for the Northern District of Iowa, between the plaintiff in the above entitled cause as one of the complainants, and the defendant in the above entitled cause as one of the defendants, entitled "First Trust and Savings Bank (formerly Bechtel Trust Company) and A. H. Schubert, as Trustees, and Phoenix Finance Corporation, Complainants, vs. Iowa-Wisconsin Bridge Company and Fayette D. Kendrick, et al., interveners," a decree was entered in said United States District Court for the North-
[fol. 674] ern District of Iowa, being a Court having jurisdiction of the parties and subject matter therein, in favor of the said Iowa-Wisconsin Bridge Company and against the complainants therein, after a hearing on the merits; that, thereafter, to-wit, on or about the eighth day of August, A. D. 1938, a decree affirming the decree of the said United States District Court for the Northern District of Iowa was entered by the Circuit Court of Appeals of the United States, Eighth Circuit, after hearing said cause on appeal from the United States District Court for the Northern District of Iowa; that, thereafter, to-wit, at the October Term, A. D. 1938, the Supreme Court of the United States denied a petition for certiorari seeking to review the decree of affirmance of the Circuit Court of Appeals of the United States, Eighth Circuit; that the plaintiff in the above entitled cause is the same party as the complainant Phoenix Finance Corporation in said action in the United States District Court for the Northern District of Iowa and is acting in the same capacity; that the issues in the above entitled cause are identical with issues decided against said plaintiff in said action in the United States District Court for the Northern District of Iowa; and that

said decree rendered in the United States District Court for the Northern District of Iowa, is still in full force and effect, and this the defendant is ready to verify.

SOUTHERLAND, BERL, POTTER & LEAHY,
Attorneys for Defendant.

[fol. 675] In the Superior Court of the State of Delaware in and for New Castle County

September Term 1939.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 64. vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

January 19, 1940. Plaintiff's attorney enters reps and issues to the first and fourth pleas but declines to reply to the second and third plea until the same are drawn out. Rule same drawn out by the second general rule day in February. As to the fifth plea the Plaintiffs' attorney enters similiter.

[fol. 676] In the Superior Court of the State of Delaware in and for New Castle County

September Term 1939

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 64, vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

Now Comes the plaintiff, by Marvel & Morford, its attorneys, and enters reps and issues to the first and fourth

pleas of the defendant heretofore filed in the above stated cause, the same being the pleas of non est factum and Statute of Limitations respectively, and declines to reply to the second and third pleas of the defendant, the same being the pleas of payment and set-off respectively, until said pleas be drawn out, and rules that said pleas be drawn out by the next general rule day.

And the said plaintiff, by its said attorneys, as to the fifth plea of the defendant heretofore filed in the above stated cause says precludi non, because it says that the issues in the above entitled cause are not identical with issues decided against the plaintiff in said action in the United States District Court for the Northern District of Iowa, that the plaintiff was not such a party to said cause that a valid adjudication could be made against it, and that the said United States District Court for the Northern District of Iowa was without jurisdiction to adjudicate against the plaintiff on any issue involved in the above stated cause, and of this the said plaintiff puts itself upon the country.

MARVEL & MORFORD,
Attorneys for plaintiff.

Filed in the District Court March 20, 1940.

[fol. 677] (Exhibit S.C.-105.)

State of Delaware,
New Castle County—ss.

I, Martin G. Hannigan, Prothonotary of the Superior Court of the State of Delaware, in and for New Castle County, do hereby certify that the foregoing pages contain a true copy of the whole Record and Proceedings in the case there stated as the same now remains in the Superior Court of the said State, at Wilmington.

In testimony whereof, I hereunto set my hand and affix the seal of the said Court, this Seventh day of March A. D. One thousand nine hundred and forty.

MARTIN G. HANNIGAN,
(Seal) Prothonotary.

State of Delaware, to-wit:—

I, Daniel J. Layton, Chief Justice of the State of Delaware, and as such, the Presiding Judge of the Superior Court of the said State, do hereby certify that the foregoing Record and attestation, made by Martin G. Hannigan, Esq., Prothonotary of the said Court, within the County of New Castle, whose name is thereto subscribed, and to which the seal of said Court is affixed, are in due form, and made by the proper officer.

In testimony whereof, I hereunto set my hand, this Seventh day of March A. D. One thousand nine hundred and forty.

Chief Justice.

[fol. 678] State of Delaware,
New Castle County—ss.

I, Martin G. Hannigan, Prothonotary of the Superior Court of the State of Delaware, in and for the County of New Castle, do certify that the Honorable Daniel J. Layton, Esquire, by whom the foregoing attestation was made, and whose name is thereto subscribed, was at the time of making thereof, and still is, Chief Justice of the State of Delaware, and, as such, the Presiding Judge of the Superior Court of the said State, duly commissioned and sworn, to all whose acts, as such, full faith and credit are, and ought to be, given, as well in Courts of Justice as elsewhere.

In testimony whereof, I hereunto set my hand and affix the seal of the said Court, this Seventh day of March A. D. One thousand nine hundred and forty.

MARTIN G. HANNIGAN,
(Seal) Prothonotary.

[fol. 679] In the Superior Court of the State of Delaware in and for New Castle County

September Term 1939.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 79. vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

Summons Case.

Please issue summons case to the September Term A. D. 1939.

MARVEL MORFORD & LOGAN,
Attorneys for plaintiff.

To Martin G. Hannigan, Prothonotary

July 11, 1939

Filed July 11, 12:20 P. M. Martin G. Hannigan, Prothonotary.

[fol. 680] Sum Case.

New Castle County—ss.

The State of Delaware, To the Sheriff of New Castle County,—Greeting:

We Command You, That you summon Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware late of your County Company so that it be and appear before the Judges of our Superior Court at Wilmington, on Monday the Eighteenth day of September next to answer Phoenix Finance Corporation a corporation duly organized and existing under the laws of the State of Delaware of a plea of trespass on the case, etc.

And have you then there this Writ.

Witness, the Honorable Daniel J. Layton, at Wilmington, the First day of May in the year of our Lord one thousand nine hundred and thirty-nine.

Issued July 11, 1939.

MARTIN G. HANNIGAN,
(Seal) Prothonotary

[fol. 681] .184

Sept. Term, A. D. 1939.

Phoenix Finance Corporation a corporation duly organized and existing under the laws of the State of Delaware,

No. 79 vs.

Iowa-Wisconsin Bridge Company a corporation duly organized and existing under the laws of the State of Delaware.

THE CORPORATION TRUST CO.
Sum Case

MM&L, Esqs. Pro. q

Summoned Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware, by serving the within writ personally upon and leaving a copy of same with Charles S. Peabbles, Assistant Secretary of Corporation Trust Company, a Delaware Corporation, said Corporation Trust Company, a corporation as aforesaid, being Corporate Resident Agent in the State of Delaware for the said Iowa-Wisconsin Bridge Company, a corporation as aforesaid, on the fourteenth day of July A. D. 1939. The President or other head officers of the said Iowa-Wisconsin Bridge Company, a corporation as aforesaid, not being found within the State of Delaware.

SAMUEL M. FORD,
Sheriff.

Cost. .75
Mlg .10
.85

In Sheriff's Hands
Jul 13 2 35 P.M. '39
New Castle County.

[fol. 682] In Superior Court of the State of Delaware in and for New Castle County.

September Term, 1939.

M. M. & L.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 79. vs.

W. & G.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

Sept. 11, 1939. Ward & Gray enter appearance for deft.

Sept. 18, 1939. Affidavit of Demand filed with copy.

Sept. 19, 1939. Copy of Affidavit of Demand delivered to Ward & Gray, Esqs. by David Anderson, Esq.

[fol. 682a] In the Superior Court of the State of Delaware in and for New Castle County.

September Term, 1939.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 79. vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

Sept. 18, 1939. Plaintiff petitions to amend form of action.

And, Now To-Wit, this 18th day of September, A. D. 1939, the within motion having been considered by the Court, the same is allowed and the form of the within action is changed from an action of case to an action of debt.

[fol. 683] In the Superior Court of the State of Delaware in and for New Castle County.

September Term, 1939.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 79. vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

Sept. 18, 1939. Narr filed, copy delivered. Rule pleas by first general rule day in October.

[fol. 684] (Affidavit of Demand.)

In the Superior Court of the State of Delaware in and for New Castle County.

September Term.

Summons Debt.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 79. vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

State of Florida,
County of Pinellas—ss.

Before Me, Clementine Japour, a Notary Public for the State of Florida and the County aforesaid, personally comes M. K. Thompson, Treasurer of Phoenix Finance Corporation, the plaintiff above named, who being by me duly sworn according to law, deposes and says:

That she is Treasurer of Phoenix Finance Corporation, the said plaintiff; that the plaintiff is the owner and holder of the bonds [sue] upon in this action and hereinafter more particulaly described; that annexed hereto are true and correct copies of the bonds sued upon in this action, the same being First Mortgage 6% Gold Bonds, Series B, of Iowa-Wisconsin Bridge Company, each in the denomination of Five Hundred Dollars ($500.00), each dated February 1, 1932, and bearing Nos. 93 and 97 respectively; that the defendant wholly failed to pay the installment of interest on said Series B Bonds, including the bonds sued upon in this action, due August 1, 1933; that said default in the payment of interest having occurred and having continued for a period of sixty days, Bechtel Trust Company and A. H. Shubert, Trustees named in the Indenture of Mortgage Deed of Trust securing the issue of bonds of which the above mentioned bonds were a part, on the 13th day of July, 1933, by notice in writing to the defendant, declared the said defendant in default and the principal of all such

bonds including the bonds sued upon in this action, to be due and payable immediately.

That the sum demanded of the said defendant is the sum [fol. 685] of One Thousand Dollars ($1,000.00), with interest at the rate of six per centum per annum from the 1st day of February, 1933, and said deponent further says that she verily believes that same is justly and truly due from the said defendant to the said plaintiff.

M. K. THOMPSON.

Sworn to and subscribed before me, this 31st day of July, A. D. 1939.

CLEMENTINE JAPOUR,
Notary Public.

(Seal)

[fol. 686] (Petition of Plaintiff to Amend Action and Allowance Thereof.)

In the Superior Court of the State of Delaware in and for New Castle County.

September Term, 1939.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 79 vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

The plaintiff above named, by Marvel, Morford & Logan, its attorneys, says that it has mistaken the form of action suited to its claim in the above cause, and moves that it be permitted to amend the form of the above action from an action of case to an action of debt, that being the form of action suited to its claim.

MARVEL MORFORD & LOGAN,
Attorneys for plaintiff.

And Now, To-wit, This 18 day of September, A. D. 1939, the within motion having been considered by the Court, the same is allowed, and the form of the within action is changed from an action of case to an action of debt.

F. L. SPEAKMAN,
J.

[fol. 687] In the Superior Court of the State of Delaware in and for New Castle County

September Term 1939.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 79 vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

New Castle County—ss.:

Iowa-Wisconsin Bridge Company, a corporation as aforesaid, the defendant above named, was summoned to answer Phoenix Finance Corporation, a corporation as aforesaid, the plaintiff above named, of a plea that it render to the said plaintiff the sum of Two Thousand Dollars ($2,000.00), lawful money of the United States of America, which it owes to and unjustly detains from it, whereupon the said plaintiff, by Marvel, Morford & Logan, its attorneys, complains:

1. For That Whereas, the said defendant, heretofore, to-wit, on the first day of February, A. D. 1932, at the County of Scott, State of Iowa, to-wit, at the County of New Castle aforesaid, by its certain writing obligatory, sealed with its seal, known as Iowa-Wisconsin Bridge Company First Mortgage Gold Bond, Series B, No. 93, acknowledged itself to be held and firmly bound to the bearer thereof, or if registered, to the registered owner thereof, at the office of Bechtel Trust Company in the City of Davenport, Iowa, in the sum of Five Hundred Dollars ($500.00) above demanded, to be paid to such bearer or registered owner on the First day of February, A. D.

1945, in gold coin of the United States of America of the standard of weight and fineness existing on January 1, 1932, and to pay interest thereon from February 1, 1932 at the rate of 6% per annum, such interest to be payable at the office of said Trust Company in like gold coin semi-annually on the first day of February and the first day of August in each year upon presentation and surrender as [fol. 688] they severally mature of the coupons for such interest annexed to said writing obligatory, and the said plaintiff further says that the obligations of the defendant in and by said writing obligatory were subject to certain terms and conditions therein expressed, including inter alia the following:

"In case of default in the payment of any installment of interest on any bond of said issue and the continuance thereof for a period of sixty days, the principal of all the bonds of said issue may be declared due and payable, prior to their regular maturity, in the manner and upon the conditions expressed in said Indenture; and may otherwise be declared due and payable, prior to such maturity, upon the occurrence and continuance of default, as in said Indenture provided."

And the said plaintiff further says that said writing obligatory was not registered and that the defendant wholly failed and refused to pay to the owner, holder or bearer thereof the interest due on the first day of August, 1933, although said owner, holder or bearer duly presented and surrendered the coupon for such interest for payment, according to the tenor and effect of said writing obligatory; that such default in the payment of interest having occurred and having continued for a period of sixty days, Bechtel Trust Company and A. H. Schubert, Trustees named in the Indenture of Mortgage Deed of Trust securing the issue of bonds of which the writing obligatory herein mentioned was a part, on the 13th day of July, A. D. 1933, by notice in writing to the defendant declared the said defendant in default and the principal of all such bonds, including the writing obligatory sued upon in this action, to be due and payable immediately.

And the said plaintiff further says that it is the owner and holder of the writing obligatory sued upon in this

action and the bearer thereof, according to the tenor and effect of the same, and that the said defendant (although often requested so to do) has not as yet paid the said sum of Five Hundred Dollars ($500.00), parcel of the sum above demanded, or interest thereon, according to the tenor and effect of said writing obligatory, or any part thereof, to the plaintiff as such bearer of said writing obligatory, or to any bearer thereof, after the declaration of said default but has hitherto wholly neglected and refused and still neglects and refuses so to do. Wherefore the said [fol. 689] plaintiff says that it is injured and has sustained damage to the amount of One Thousand Dollars ($1,000.00), lawful money of the United States of America, and therefore it brings its suit, &c.

And the said plaintiff brings here into Court the said writing obligatory sealed as aforesaid, which gives sufficient evidence to the Court here of the debt aforesaid, in the form aforesaid, the date whereof is the day and year in that behalf above mentioned. A true and correct copy of said writing obligatory designated "Copy of Instrument of Writing Sued Upon—A," is attached hereto and by this reference the same and the several terms and conditions thereof are made a part of this count of this declaration.

2. And Whereas Also, the said defendant, heretofore, to-wit, on the first day of February, A. D. 1932, at the County of Scott, State of Iowa, to-wit, at the County of New Castle aforesaid, by its certain writing obligatory, sealed with its seal, known as Iowa-Wisconsin Bridge Company First Mortgage Gold Bond, Series B, No. 97, acknowledged itself to be held and firmly bound to the bearer thereof, or if registered, to the registered owner thereof, at the office of Bechtel Trust Company in the City of Davenport, Iowa, in the sum of Five Hundred Dollars ($500.00) above demanded, to be paid to such bearer or registered owner on the first day of February, A. D. 1945, in gold coin of the United States of America of the standard of weight and fineness existing on January 1, 1932, and to pay interest thereon from February 1, 1932 at the rate of 6% per annum, such interest to be payable at the office of said Trust Company in like gold coin semi-

annually on the first day of February and the first day of August in each year upon presentation and surrender as they severally mature of the coupons for such interest annexed to said writing obligatory, and the said plaintiff further says that the obligations of the defendant in and by said writing obligatory were subject to certain terms and conditions therein expressed, including inter alia the following:

"In case of default in the payment of any installment of interest on any bond of said issue and the continuance thereof for a period of sixty days, the principal of all the bonds of said issue may be declared due and payable, prior to their regular maturity, in the manner and upon the conditions expressed in said Indenture; and may otherwise be declared due and payable, prior to such maturity, upon the occurrence and continuance of default, as in said Indenture provided."

[fol. 690] And the said plaintiff further says that said writing obligatory was not registered and that the defendant wholly failed and refused to pay to the owner, holder or bearer thereof the interest due on the first day of August, 1933, although said owner, holder or bearer duly presented and surrendered the coupon for such interest for payment, according to the tenor and effect of said writing obligatory; that such default in the payment of interest having occurred and having continued for a period of sixty days, Bechtel Trust Company and A. H. Shubert, Trustees named in the Indenture of Mortgage Deed of Trust securing the issue of bonds of which the writing obligatory herein mentioned was a part, on the 13th day of July, A. D. 1933, by notice in writing to the defendant declared the said defendant in default and the principal of all such bonds, including the writing obligatory sued upon in this action, to be due and payable immediately.

And the said plaintiff further says that it is the owner and holder of the writing obligatory sued upon in this action and the bearer thereof, according to the tenor and effect of the same, and that the said defendant (although often requested so to do) has not as yet paid the said sum of Five Hundred Dollars ($500.00), parcel of the sum above demanded, or interest thereon, according to the tenor

and effect of said writing obligatory, or any part thereof, to the plaintiff as such bearer of said writing obligatory, or to any bearer thereof, after the declaration of said default but has hitherto wholly neglected and refused and still neglects and refuses so to do. Wherefore the said plaintiff says that it is injured and has sustained damage to the amount of One Thousand Dollars ($1,000.00), lawful money of the United States of America, and therefore it brings its suit, &c.

And the said plaintiff brings here into Court the said writing obligatory sealed as aforesaid, which gives sufficient evidence to the Court here of the debt aforesaid, in the form aforesaid, the date whereof is the day and year in that behalf above mentioned. A true and correct copy of said writing obligatory designated "Copy of Instrument of Writing Sued Upon—B," is attached hereto and by this reference the same and the several terms and conditions thereof are made a part of this count of this declaration.

MARVEL MORFORD & LOGAN,
Attorneys for Plaintiff.

[fol. 691] (Note by the clerk of the District Court: Copies of certain bonds of Iowa-Wisconsin Bridge Company, and of certain interest coupons belonging thereto, which are referred to in the foregoing pleading, are omitted here as copies appear as part of Exhibit SC-5 at folio pages 447 to 460 of this transcript.)

[fol. 692] In the Superior Court of the State of Delaware in and for New Castle County

September Term, 1939.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 79 vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

Sept. 19, 1939. By consent of attorneys, the time for filing affidavit of defense extended to October 3, 1939.

Oct. 3. 1939. Affidavit of Defense filed. Copy of affidavit of Defense sent to M. M. & L., attorneys for the Plaintiffs.

[fol. 693] (Affidavit of Defense.)

In the Superior Court of the State of Delaware in and for New Castle County.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

Summons Debt.

No. 79 September Term, A. D. 1939.

State of Iowa,
Cerro Gordo County—ss.:

Be It Remembered that on this 30th day of September, A. D. 1939, before me, F. T. Barrett, a Notary Public of the State of Iowa, in and for Cerro Grodo County, personally comes Irene M. Bell, Secretary and Treasurer of the Iowa-Wisconsin Bridge Company, the defendant above named, who being by me duly qualified according to law, deposes and says that she is the Secretary and Treasurer of the Iowa-Wisconsin Bridge Company, defendant in the above named suit, and that she verily believes that there is a legal defense to the whole of the cause of action in said suit, the nature and character of which defense is fraud, want of consideration, former adjudication, want of lawful authorized execution and delivery, and offset.

That John A. Thompson was president of and interested in and with his wife M. K. Thompson and associates A. B. Wilder and Emery H. English, controlled the Phoenix Finance System Incorporated and other affiliated companies.

That M. White was John A. Thompson's secretary and an officer of the Phoenix Finance System Incorporated.

[fol. 694] That Thompson & Company was a wholly owned subsidiary of the Phoenix Finance System Incorporated and was but an agency adjunct and instrumentality of the Phoenix Finance System, Inc., and used as such.

That in October and November 1930 through negotiations with John W. Shaffer and Vernon W. O'Connor, John A. Thompson became President of and acquired control of the Iowa-Wisconsin Bridge Company (hereinafter called the Bridge Company). At about the same time the number of directors of the Bridge Company was increased and Thompson together with other directors of the Phoenix Finance System, Inc. became directors of the Bridge Company. From that time on, Thompson controlled the Bridge Company.

On November 26, 1930, a stated settlement as of October 31, 1930, was made between the Standard Shares Holding Company and the Bridge Company, under which there were delivered to the Bridge Company by its trustees, liquid assets, such as cash, bills and accounts receivable, stocks and bonds, inventoried at $90,235.68; construction accounts representing amounts which had been paid for construction to date aggregating $183,496.90, and equipment, etc., amounting to $1,986., and commission and organization and expense accounts amounting to $75,231.08, making a total of $350,950.00, and there had been sold by said trustee for the account of the Bridge Company stock of the latter at $100 per share, amounting to $350,950.00. The settlement also provided for the return of all stock of the Bridge Company held by said trustee except 1300 shares of Class B stock, which were returned to the Bridge Company in consideration of a so-called management contract, the terms of which are immaterial in this litigation. On the $90,935.00 of liquid assets, there was later realized over $79,000.00 in cash and the Bridge Company had treasury stock in the amount of $390,050.00 to build its superstructure and complete its bridge. The substructure was practically complete and the sub-contractor thereof had been paid within $8200.00 of the total cost and the grading was well under way.

Under date of November 11, 1930, a contract for the completion of the bridge was entered into between the Bridge

[fol. 695] Company, acting through John A. Thompson as president and John W. Shaffer & Company, which included erection of super-structure of the bridge, erection of piles and trestles over certain sloughs, erection of toll house, etc., and surfacing of roadway and whereby the Bridge Company agreed to and did pay $10,000 in cash and agreed to and did deliver 3200 shares of its capital stock at a fixed price of $320,000 to John W. Shaffer & Company, and Shaffer & Company in said contract agreed to furnish a surety bond to insure the obligations of said Shaffer & Company. Extras were required to be ordered in writing. John W. Shaffer & Company sublet the contract for steel to McClintic-Marshall Company and the construction work to the Industrial Contracting Company.

In November 1930 immediately after the issuance of said 3200 shares of stock to Shaffer & Company the latter company sold said stock to Thompson & Company and received the promissory note of Thompson & Company for $224,000 therefor.

That about the first of November 1930 140 shares of Bridge Company stock were issued to Phoenix Finance System, Inc. and the value thereof fixed at $100 per share, to-wit: $14,000. That upon the issuance of such stock Phoenix Finance System, Inc. became indebted to the Bridge Company for said amount. That such amount has not been paid. That the Phoenix Finance System, Inc. disposed of such stock to the public. That thereafter John A. Thompson, then president of the Bridge Company, dominating and controlling the Bridge Company, and his associates caused the execution of a purported guaranty contract providing for the turning over to the Phoenix Finance System, Inc., such stock without payment therefor. That in such transaction John A. Thompson acted in a dual capacity as president of the Bridge Company and as president of the Phoenix Finance System, Inc. and acted in the interests of himself and his affiliated companies as against the interests of the Bridge Company and dealt with himself in such transaction. That the Bridge Company has not received consideration for the aforesaid stock and there is due the Bridge Company on account thereof the sum of $14,000 with interest.

[fol. 696] That John A. Thompson on November 5, 1930 purchased 65 shares of Bridge Company stock from the Bridge Company at $100 per share, and on the same day A. B. Wilder, also a director of the Bridge Company, purchased 10 shares of Bridge Company stock from the Bridge Company at $100 per share. That on the 31st day of December, 1930, Thompson & Company purchased 170 shares of Bridge Company stock from the Bridge Company at $100 per share. That subsequent to such purchase of stock by John A. Thompson and A. B. Wilder on the 31st day of December, 1930 the said John A. Thompson through his dominant control of the Bridge Company credited to Thompson & Company on the books of the Bridge Company 15% commission on all of the aforesaid stock in the sum of $3,675.00. That it was the duty of John A. Thompson and A. B. Wilder as directors of the Bridge Company to assist in selling stock owned by the Bridge Company. That in the selling of said stock no exceptional or extraordinary services were rendered and they were not entitled to credit for said commissions.

A stockholders' meeting of the Bridge Company was held March 10, 1931, which was controlled by the stock of Thompson & Company and John A. Thompson, 1310 shares and proxies held by Thompson 375 shares, a total of 1635 shares out of 2586 shares represented, at which meeting a board of directors was elected controlled by said Thompson. Following said stockholders' meeting, a directors' meeting was held attended by only Thompson directors, [vis].. V. W. O'Connor, John A. Thompson, A. B. Wilder and Oscar R. Thorson. At this meeting, there was passed a purported resolution providing for the issuance of a $50,000 mortgage to the Phoenix Finance System, Inc., on the properties of the Iowa-Wisconsin Bridge Company which resolution contained the false and fraudulent recital that funds received from sale of stock had been inadequate to properly finance the rapid completion of the bridge; whereas, the Bridge Company then had nothing to do with the sale of stock and it had delivered to J. W. Shaffer & Company $320,000 of its stock and $10,000 in cash for the completion [fol. 697] of the bridge. That pursuant to such resolution

a mortgage was executed to Phoenix Finance System, Inc. for $50,000 signed on behalf of the Bridge Company by A. B. Wilder, who was then also an officer and director of said mortgage company. That in truth and in fact no indebtedness of said Bridge Company to the Phoenix Finance System, Inc. existed and the Bridge Company received no consideration for the execution of said mortgage; that the same was and is wholly without consideration, fraudulent and void. At said time said Thompson caused entries to be made on the books of said Bridge Company purporting to show the receipt of $50,000 in cash, whereas, in truth and in fact, said amount and no part thereof was received by the Bridge Company.

That about the 11th of March 1931 John A. Thompson and his affiliated companies, through the dominant control of the Iowa-Wisconsin Bridge Company, caused a payment of $3000 to be made from the funds of the Bridge Company to A. B. Wilder through the medium of checks issued to John W. Shaffer and immediately endorsed and delivered to A. B. Wilder, and $1000 thereof was then turned over to Thompson & Company by said Wilder. That the said Wilder was then an officer and director of the Phoenix Finance System, Inc., and also a director of the Bridge Company. That no resolution was passed by the stockholders or directors of the Bridge Company authorizing such payments to said Wilder nor was there any action taken or resolution passed by the Bridge Company providing for the payment of any amount to said Wilder for services nor had there been nor were there any exceptional or extraordinary services rendered by said Wilder to the Bridge Company. That no consideration passed to the Bridge Company for such sums. That the said Thompson and his affiliated companies controlling the Bridge Company, so manipulated its books as to cause fictitious entries to be made thereon as though said sums were paid on approaches, when in fact no work was done on approaches for which said sums or any part thereof was a proper payment. That payment of said amounts was a misappropriation of the Bridge Company's funds. That on the 1st day [fol. 698] of November 1931 John A. Thompson and his affiliated companies through the exercise of dominant control of the Bridge Company turned

over to the Bridge Company $5,410.85 of notes taken by Thompson & Company in the sales of Bridge Company stock owned by Thompson & Company and with which Thompson & Company held as collateral such stock sold by it. That said Thompson & Company took or received from the Bridge Company $5,410.85 for such notes. That in such transaction John A. Thompson acted in a dual capacity as president of the Bridge Company and as president of the Phoenix Finance System, Inc., and controlling its subsidiary Thompson & Company and acted in the interests of himself and his affiliated companies against the interests of the Bridge Company and dealt with himself in such transaction. The Bridge Company at the time of such transaction did not have any surplus from which it could purchase any of its stock.

That notwithstanding the alleged mortgage Thompson & Company continued to sell its bridge stock through its agents at $100 per share, on the representation that the Bridge Company had no funded debt, and concealed the fact of the existence of said mortgage from stockholders and directors of the Bridge Company.

That on August 6, 1931, John W. Shaffer & Company owed Industrial Contracting Company $10,000; McClintic-Marshall Company $11,262.71, and to Kramer & Hogg an amount, then in dispute, Shaffer & Company also claimed to be entitled to payment for certain steel; certain extra labor and material, and commissions. There were also other matters in dispute between the Bridge Company and Shaffer & Company with reference to the bridge contracts. To make a complete settlement, a stated settlement contract was made August 6, 1931, between the Bridge Company, as party of the first part, and John W. Shaffer, V. W. O'Connor, John W. Shaffer & Co., and Standard Shares Holding Company, as parties of the second part, which was executed on behalf of the Bridge Company, by J. A. Thompson as president and which provided:

[fol. 699] (a) That the Bridge Company transfer to the other parties to the contract 120 shares of its common stock and 80 shares of its preferred stock and certain other securities which were of the value of $2,475, and pay to Kramer & Hogg the balance due them.

(b) That the second parties (Shaffer, O'Connor, Standard Shares Holding Company and Shaffer & Company) accept such consideration "as full and complete settlement of all sums due them and/or any of them and for full satisfaction and stated settlement of any and all claims of all kinds whatsoever arising out of any contract or other relations between the parties hereto and/or pertaining in any way to said toll bridge and second parties separately and jointly hereby release said Iowa-Wisconsin Bridge Company fully and completely. Second parties hereby specifically acknowledge receipt of full payment for all engineering, designing and building of said bridge, and for all material, services and all other things pertaining to said bridge."

The Bridge Company pursuant to this contract delivered 200 shares of its stock of the value of $20,000 and other securities of the value of $2,475.

That at about the same time John W. Shaffer agreed to and did turn over to Thompson of Thompson and Company, and president of the Phoenix Finance System, Inc., $10,000 of the Bridge Company stock (100 shares received by Shaffer) and Thompson & Company agreed to pay $10,000 owing to the Industrial Contracting Company and $11,262.71 owing to the McClintic-Marshall Company. Neither the Industrial Contracting Company nor the McClintic-Marshall Company had any contract with the Bridge Company, nor was the Bridge Company indebted to them in any amount.

On September 24, 1931, the Industrial Contracting Company drew a sight draft on Phoenix Finance System, Inc. for the balance of $10,000 due them which Thompson & Company had agreed to pay and for which the Bridge Company was not liable. As a part of the fraudulent scheme and plan, leading up to the issuance of the bonds hereinafter mentioned, said John A. Thompson caused entries and deposits and withdrawals on the Bridge Company's records to be made, purporting to show that Phoenix Finance System, Inc. had advanced to the Bridge Company [fol. 700] the sum of $10,000 and that the Bridge Company had made payment on said sight draft, and pretended thereby to show an indebtedness of $10,000 due from the

Bridge Company to Phoenix Finance System, Inc., whereas, in truth and in fact, the said amount was an obligation of Thompson & Company and not of the Bridge Company, and nothing was due from the Bridge Company to Phoenix Finance System, Inc. on account thereof.

That on November 11, 1931, a meeting of the directors of the Bridge Company was held at which a majority present were dominated by John A. Thompson, as president. At this meeting it was represented by John A. Thompson that there was due the Phoenix Finance Corporation $54,000 on the purported mortgage of March 10, 1931, and $10,000 for money advanced Industrial Contracting Company; that there was other indebtedness including a claim of McClintic-Marshall Company for $12,000 and further obligations aggregating $40,000. That at said meeting resolutions were adopted providing for a bond issue of $200,000; for a stockholders' meeting to consider the bond issue; for the delivery of bonds to pay the $50,000 mortgage; and for the payment of other alleged claims.

On the same date, a letter prepared at the dictation of John A. Thompson, and signed by Oscar R. Thorson, as Secretary-Treasurer, of the Bridge Company, under his direction was sent to the stockholders of said Bridge Company. In said letter it was falsely and fraudulently represented to the stockholders of the Bridge Company for the purpose of inducing said stockholders to approve the proposed bond issue of $200,000, and to induce them to forward proxies to said Thompson and his associates, as follows:

(a) That in October, 1930, negotiations were opened with Phoenix Finance System, Inc., to lend its aid in arranging for the financing of the completion of the bridge and to save the project from absolute failure.

(b) That there was an understanding that the Phoenix Finance would be repaid by the Bridge Company on demand for any such advances that might be required to be made by it temporarily in order to fulfill the guarantee and to permit the continuation of work on the bridge.

[fol. 701] (c) That sale of stock to the public showing no improvement and in order that the work on the bridge might not be delayed Phoenix Finance System, Inc. made substantial advances.

(d) That construction of the bridge went forward without delay and the cash required for material and labor was advanced regularly by the Phoenix Finance Company.

(e) That there had been advanced by the Phoenix Finance System, Inc. to the Bridge Company in the payment of bills for labor and material to complete the bridge approximately $70,000, $50,000 of which is secured by a mortgage which was due December 10, 1931.

(f) In addition to the sum of $70,000 which has been advanced by the Phoenix Finance System, Inc. there will be immediately required the further sum of approximately $25,000 to complete payment of outstanding obligations.

(g) The board of directors was confronted with the problem of raising additional funds with which to satisfy the claims of Kramer & Hogg and McClintic-Marshall and Company in order to prevent threatened liens and litigations to collect these amounts.

(h) There was never intended that this cash advanced by Phoenix Finance System, Inc. to the Bridge Company should be of a permanent nature and it must be repaid.

That the aforesaid representations were misleading, false and fraudulent.

That following the aforesaid letter, notice of a proposed stockholders' meeting for December 22, 1931, with form of proxy running to Emory H. English, Oscar R. Thorson and J. H. Thompson enclosed was sent to Class B. Voting stockholders and the fraudulent statements contained in the letter of November 11, 1931, were not corrected, nor was any true information given with respect thereto. That said notice called for a special meeting of Class B voting common stock, to consider and authorize directors to borrow, not to exceed $200,000; to authorize the execution of mortgage bonds, not to exceed that amount, and to provide the terms and conditions under which such bonds should be issued; to authorize the directors to convey to a named trustee by mortgage deed of trust all of the property and assets of the company to secure the payment of the prin- [fol. 702] cipal and interest of such bonds; to authorize the directors to sell, pledge or otherwise dispose of such bonds and to apply the proceeds thereof to such corporate pur-

poses as the board might from time to time determine. In response to such letter of November 11, 1931, and said notice of November 20, 1931, the proxies of stockholders were procured reading to Oscar R. Thorson, Emory H. English and J. H. Thompson, Emory H. English and Oscar R. Thorson being the representatives of John A. Thompson, and these proxies were voted by Oscar R. Thorson in unison with the stock and proxies held by John A. Thompson, controlled and dominated the stockholders' meeting held on December 22, 1931, as part of the scheme, plan and conspiracy. At this meeting Oscar R. Thorson voted by proxy 1011 shares and in person 18 shares and John A. Thompson by proxy 505 shares and in person 137 shares and Mrs. John A. Thompson in person 20 shares M. White 18 shares. The shares thus voted by Thorson, John A. Thompson, M. K. Thompson and M. White being 1709 shares, which were more than a majority of the 2608 shares represented at the meeting. That at said meeting there was adopted a resolution authorizing the issuance of first mortgage bonds in the aggregate principal sum of $200,000, and the conveyance by mortgage deed of trust of all of the property of the Bridge Company to secure the payment of such bonds. The resolution relating to the bond issue was voted and carried by the votes of said John A. Thompson and his controlled associates Oscar R. Thorson, M. White and his wife M. K. Thompson. Such resolution was presented at said stockholders meeting with false preambles and representations as reasons or excuse for voting of the bond issue as follows:

(a) "Whereas it was originally contemplated that the funds necessary to construct the Blackhawk Bridge would be acquired through the sale of stock and whereas a substantial part of the funds were acquired in that manner, but due to a change in general economic conditions [its] developed that it was impossible to realize sufficient funds from that source as rapidly as the same were required to complete the bridge project economically.

(b) "Whereas, it was necessary for the company to borrow funds to expedite the completion of said bridge and [fol. 703] avoid disaster and whereas the amount of steel required and cost of building the bridge was greatly in excess of the cash originally estimated.

(c) "Whereas, there now remains unsold capital stock of the company in the approximate amount of $120,000.

(d) "Whereas, it now becomes necessary for the company to raise sufficient funds with which to pay loans made to the company by the Phoenix Finance System, Inc. a greater portion of which is secured by mortgage on the property of the company and which is now past due.

(e) "Whereas, the company for these and other corporate purposes will be presently required to borrow not to exceed $100,000 to discharge these obligations and others which it is contemplated will presently arise.

(f) "Whereas, it is anticipated that additional funds, not to exceed $100,000 may from time to time be required to discharge present or future obligations of the company to provide for the payment of pavement and improvement of dike and to care for flood conditions and other emergencies.

(g) "Whereas, the company finds itself unable to acquire funds for these purposes except through the creation and issuance of bonds secured by mortgage deed of trust covering the assets, property and income of the property, and whereas the interests of the stockholders would be jeopardized unless such funds or a part thereof are made available within a reasonable time."

That the aforesaid preamble, statements and representations were misleading, false and fraudulent and made with intent to deceive and defraud the Bridge Company and its stockholders. That said meeting was wholly controlled and dominated by John A. Thompson and his associates, officers and directors of the Phoenix Finance System, Inc. That other stockholders, relying on the aforesaid false and fraudulent statements contained in said letters and notice and believing the same to be true and knowing not to the contrary sent a proxy in the form aforesaid. That independent stockholders at said meeting relying on the afore- [fol. 704] said representations and believing the same to be true and not knowing the contrary voted for such resolutions, and independent and uncontrolled stockholders who voted for such resolutions did so on account of being deceived by the aforesaid false representations.

That following such special meeting, a directors' meeting was held, dominated and controlled by John A. Thompson, at which meeting a purported resolution was passed with respect to the $50,000 mortgage, and with reference to the issuance of the bonds therefor; that at said meeting it was represented and claimed by John A. Thompson that it was a valid and bona fide mortgage, and that said John A. Thompson did not disclose the fact that the alleged mortgage was not based on a proper consideration, and that the same was fraudulent; and that such independent directors as were present, voting for such resolution on the said representations of said John A. Thompson, believed the same to be true, knowing nothing to the contrary and were deceived thereby.

On January 5, 1932, a directors' meeting of the Bridge Company was held at which there were present four Thompson controlled directors, Emory H. English, Oscar R. Thorson, A. B. Wilder and M. White and no others, at which meeting these four Thompson-Phoenix Finance System, Inc. directors passed a resolution to purchase from the Phoenix Finance System, Inc. 517 shares of Class A preferred stock for $51,700., with interest at the rate of 6% from January 1, 1931, and to deliver Class B bonds of the Bridge Company in such face amount as would on the basis of 8% yield $51,700 with interest thereon which amounted to $60,500 of bonds. That neither on the 5th day of January 1932, nor at any time thereafter did the Iowa-Wisconsin Bridge Company have any surplus with which to make a repurchase of its own stock.

That while the Articles of Incorporation of the Bridge Company contain the following provisions set forth in paragraph seven of the interveners' petition of intervention, and paragraph eleven of these findings of fact, the Bridge Company, through the influence of the said Thompson and his associates, caused $60,500 of said bonds to be issued to the said Thompson or his owned and controlled [fol. 705] institutions. When that was done, there was outstanding other Class A stock held by other stockholders who were not given the permission or opportunity by the Bridge Company, as was the said Thompson and his affiliated companies, to surrender such Class A stock and receive bonds, as did the said Thompson and his institutions.

That no notice of intention of the corporation to redeem said Class A shares was mailed or given to holders of said stock, as required by said paragraph seven of the Articles of Incorporation, except to the said Thompson and his controlled companies. That in other words, all of the said Class A stock was not purchased by the Bridge Company at said time through the issuance of the said bonds or otherwise, nor was a portion of the said Class A stock redeemed proportionately, as provided by the Articles of Incorporation set forth in paragraph seven of the petition of intervention and paragraph 11 of these findings. And at said time the said Class A stock was thus surrendered by the said Thompson without notice to the other stockholders similarly situated, and that such transaction took place without a legal authorizing vote, on the part of the stockholders or directors of the Bridge Company. That so far as Thompson and his associates were concerned, they were voting under the influence of Thompson, but so far as independent stockholders and directors were concerned, they did not know the true facts when they voted for the pretended authorizing resolution.

That when the said Thompson and his companies exchanged the said Class A stock for the said bonds in the amount of approximately $60,500, such action caused an impairment of the capital of the corporation in violation of said Delaware statute.

That the action of the said Thompson, in promoting said exchange of Class A stock for bonds, was fraudulent and for the purpose of conferring on himself a preference over other holders of Class A stock. That by thus conspiring and acting fraudulently the said Thompson did acquire a preference over other holders of such Class A stock.

That on March 7, 1952, a meeting of the board of directors of the Bridge Company was held at which were pres- [fol. 706] ent Emory H. English, John A. Thompson, M. K. Thompson, Oscar R. Thorson, H. T. Wagner and A. B. Wilder, all Thompson and Phoenix Finance System, Inc., controlled directors, at which a purported resolution was adopted for the delivery of $97,000 of Class A bonds of the Bridge Company to the Phoenix Finance System, Inc. for the purported $50,000 mortgage and interest thereon and

for $10,000 to the Industrial Contracting Company, $9000 to Kramer & Hogg and $11,262.71 to McClintic-Marshall Company, with interest on such items amounting to $83,-811.29 and with discount on the bonds of $12,727.31, making a purported total of $96,538.58 and a purported balance of $461.42 being charged to Phoenix Finance System, Inc. on the books of the Bridge Company, making a total of $97,000.

The aforesaid $10,000 to the Industrial Contracting Company was neither due from nor paid by the Bridge Company as aforesaid and the Bridge Company did not owe the $11,262.71 to McClintic-Marshall Company. That said two items were items that had been fully covered and disposed of by the Bridge Company in its settlement with John W. Shaffer & Company and were items which Thompson & Company, subsidiary of Phoenix Finance System, Inc. had undertaken to pay. That as a part of the scheme, plan and conspiracy leading up to the issuance of said bonds hereinafter mentioned, the said Thompson paid the balance of $11,262.71 to McClintic Marshall Company and as a form and pretense the said John A. Thompson, dominating and controlling the Bridge Company in its acts, in making payment thereof for the Phoenix Finance System, Inc. as aforesaid, attempted to carry out such transaction as though he was making payment thereof for the Bridge Company and caused false entries to be made on the books of the Bridge Company as though said approximate amount had been advanced by the Phoenix Finance System, Inc. to the Bridge Company and the item paid by the Bridge Company, when in fact the Bridge Company did not owe said item.

That on July 7, 1933, a meeting of the board of directors of the Bridge Company was held at which there were present John A. Thompson, Emory H. English, Oscar R. Thorson, H. T. Wagner, A. B. Wilder, M. K. Thompson and G. W. Huntley, all but one of the members present, G. W. Huntley, being Thompson-Phoenix Finance Corporation controlled directors.

[fol. 707] At this meeting vice-president Emory H. English and Secretary Thorson reported a purported indebtedness to the Phoenix Finance Corporation of $12,110.19 on open

account and $5,625 on notes, which included the $500 note sued upon in this cause, $9906.10 of said $12,110.19 being purported interest furnished by Phoenix Finance Corporation on the aforesaid fraudulent bonds held by the Phoenix, which were known to the officers of the Phoenix Finance Corporation to be fraudulent, and $1505.75 being charged to the Bridge Company for Phoenix Finance Corporation officers and employes, and an item of $650 which were merely a journal entry and which neither the Bridge Company gained nor lost. During the period the officers of the Phoenix thus purportedly charged the Bridge Company for salaries of the Phoenix Finance System, Inc. officers and employes, the Bridge Company was paying for its own toll-keepers and was paying Thorson $500 per month as Secretary-Treasurer to take care of its accounts which did not require much bookkeeping and there was no occasion for charging the Bridge Company with the salaries of the Phoenix Finance System, Inc. officers and employes, because it had ample help of its own.

On motion of Wagner, seconded by Wilder, a resolution was adopted through the Thompson-Phoenix Finance Corporation controlled directors, directing the execution of a demand note to the Phoenix for $12,110.19, to cover the purported items contained in said open account and instructing the treasurer to pledge $21,100 of the Class B Bridge Company bonds as collateral to this note and to three other purported notes, one for $2000 and one for $3125 and one for $500, hereinafter further referred to.

At the time of the purported payment of interest on the purported bonds through an alleged loan of the Phoenix [fol. 708] Finance Corporation to the Bridge Company, John A. Thompson, Emory H. English and A. B. Wilder were directors and officers of the Phoenix Finance Corporation, and were also officers and directors of the Bridge Company and controlled its accounts and the debits and credits placed on the books of the Bridge Company, the actual entries being made by M. Graney, an employee and assistant secretary of the Phoenix Finance Corporation. John A. Thompson and Emory H. English, to carry out a purported transaction as though the payment of interest were made by the Bridge Company, on the 7th day of

February, 1933, made a deposit for the Phoenix Finance Corporation to the account of the Bridge Company in the sum of $6.896.00 and on the same date they drew three checks to the Bechtel Trust Co., one No. 189, for $6,480 payment of interest; one No. 190 for $15.00 payment of Government tax, and one No. 191 for $401.00 marked accounts payable, representing the charge of the Bechtel Trust Company, making the aggregate of $6,896. These checks on the part of the Bridge Company were all signed by M. Graney, employees of the Phoenix Finance Corporation. A check for $6,480 representing interest, was thereafter remitted to Phoenix Finance Corporation, they being the holders of all the bonds on which interest was paid. On the 10th day of February, 1933, as though the Bridge Company was paying interest on the bonds, the said Thompson and Emory H. English deposited to the account of the Bridge Company, by the Phoenix Finance Corporation, $2,910.00. At the same time a check was written on the account of the Bridge Company in the Iowa-Des Moines National Bank, No. 193, for $2,910.00 to Bechtel Trust Company, being dated February 9th, 1933, payment of interest due January 1st, 1933, on Class A bonds held by Phoenix Finance Corporation. This check was also signed by M. Graney.

The purported interest payment on bonds was a mere manipulation of Thompson and officers and employees of the Phoenix Finance Corporation while controlling the Bridge Company and its books and accounts for the purpose of making it appear as though the Bridge Company [fol. 709] paid interest on the fraudulent bonds and with the evident purpose of attempting to create a supposed waiver in favor of the Phoenix Finance Corporation of the fraudulent character of the bonds, or an estoppel, to the detriment of the Bridge Company.

That there is an item of $109.86 being for claimed balance on the invalid and fraudulent exchange of 517 shares of stock for bonds.

That none of the aforesaid claims were valid claims. That at the time of the purported and pretended execution of each of said notes set forth in plaintiff's demand, John A. Thompson-Phoenix Finance Corporation controlled

and dominated the Iowa-Wisconsin Bridge Company, its officers and directors, and said John A. Thompson at said time was president of the Iowa-Wisconsin Bridge Company, and of the Phoenix Finance Corporation, and that both he and other directors of the Phoenix Finance Corporation, who were also directors of the Bridge Company, were acting in a dual capacity against the interests of the Bridge Company when they caused the execution of said notes. At the dates of said pretended notes and their claimed, execution, the Phoenix Finance Corporation was indebted to the Bridge Company in far greater amount than the amount of said notes. That at that time it was indebted to the Bridge Company in the sum of $3,000 for checks of the Bridge Company of that amount given to A. B. Wilder at the time of the execution of the fraudulent $50,000 mortgage, without consideration, which $3000 had not been repaid to the Bridge Company. That the conspirators, John A. Thompson, Phoenix Finance Corporation, and Thompson & Company, were jointly and severally liable therefor, and said notes were off-set by the $3000 thus wrongfully appropriated from the Bridge Company, and disbursed $2000 to A. B. Wilder, and $1000 check to Thompson & Company, and were further offset by the fact that the Phoenix Finance System, Inc. and its [fol. 710] successor, the Phoenix Finance Corporation, also owed the Bridge Company $14,000 with interest thereon from November 1930 for Bridge Company stock which it had received fraudulently without consideration, and charged to promotion, through the dominant control of John A. Thompson, and offset by other obligations and items due the Bridge Company from the Phoenix Finance Corporation and its predecessor. That at the date of said purported notes, the Phoenix Finance Corporation was indebted to the Bridge Company in a far greater amount than the amount of said purported notes, and if at that time the Phoenix Finance Corporation made any payment to or put any funds into the account of the Bridge Company, it was merely a partial payment on what was due the Bridge Company from the Phoenix Finance Corporation, and did not furnish any basis or consideration for the execution of said purported notes, and said notes are without consideration, which fact was well known to the

said John A. Thompson and the Phoenix Finance Corporation; that said purported notes are not under seal, and that said notes were never lawfully executed and delivered.

That all of the aforesaid acts and transactions were part and parcel of a plan, scheme and conspiracy on the part of the said John A. Thompson, and Phoenix Finance Corporation, and its predecessors and associates, and done with the fraudulent intent and purpose of cheating and defrauding the Bridge Company and its stockholders out of its property, and to acquire the ownership of said Bridge Company's property to the exclusion of the Bridge Company and its stockholders; and as a part of said fraudulent scheme and plan caused the bonds aforesaid to be issued and trust deed purported to secure the same to be executed without lawful consideration to the Bridge Company.

That the Phoenix Finance Corporation, at the time it was organized, was officered and controlled by the same officers as Phoenix Finance System, Inc. and took over the succession both of assets and liabilities, with full notice of the facts and circumstances surrounding the bond [fol. 711] issue in controversy in this case, and assumed the entire fruits and activities of its predecessor, so far as concerns this case, and proceeded to carry on with the same notice and purpose, adopting all of the plans and results of its predecessor.

That in the aforesaid trust deed securing the aforesaid bonds, Bechtel Trust Company, an Iowa corporation (now First Trust & Savings Bank (and A. H. Schubert, a citizen of Wisconsin, were named as trustees, and on the 28th of August, 1933, filed a bill of foreclosure at the instance of the Phoenix Finance Corporation and with an arrangement that said suit would be instituted and prosecuted and the Phoenix Finance Corporation would save and keep harmless such trustees from all costs, expenses and liabilities, including attorney's fees connected with the case. That said suit was filed in the United States District Court for the Northern District of Iowa, in the name of Bechtel Trust Company, an Iowa corporation (now First Trust & Savings Bank) and A. H. Schubert, a citizen of Wisconsin, as trustees complainants, vs. Iowa-Wisconsin Bridge Com-

pany, a Delaware corporation, defendant, for the foreclosure of the aforesaid trust deed and bonds; that the aforesaid trust deed securing the aforesaid bond issue of $200,000 purportedly covered all of the property of the Iowa-Wisconsin Bridge Company.

The trust deed, which is in the ordinary form of a mortgage trust deed securing a bond issue, made it the duty of the Bridge Company to pay taxes on the mortgaged property, to pay interest on the bonds, and to pay the bonds as they matured. In case of default for a period of sixty (60) days it was provided that the trustees may, and upon the written request of the holders of twenty-five per cent of the bonds then in default, shall [declared] the principal of all the bonds due, and "shall proceed to protect and enforce their rights and the rights of the bondholders, under this Indenture by a suit or suits in equity, or at law * * by * * * foreclosure hereunder, or for the enforce-[fol. 712] ment of any other appropriate legal or equitable remedy as the trustees * * * shall deem most effectual."

It is further provided in the trust deed that no holder of any bond or coupon secured hereby shall have any right to institute any suit, action or proceeding in equity or law, for the foreclosure of this Indenture * * * or for any other remedy hereunder, except in case the trustees after notice and demand refuse to act. The said suit was commenced by the trustees at the request of the Phoenix Finance Corporation as the holder of more than twenty-five per cent of the bonds, and was prosecuted by attorneys selected by it. The bill alleged jurisdiction based upon diversity of citizenship, the authority of the trustees to sue under the terms of the trust deed, default, and acceleration of due date, and the prayer was for foreclosure for all of the bonds, including those issued on or as collateral for the aforesaid notes. The prayer was: "that an account be taken of the bonds and interest coupons secured by said mortgage deed of trust, and the amount due on the said bonds for principal and interest or otherwise—that said Iowa-Wisconsin Bridge Company be decreed to pay the amount found due— within a short day to be fixed by the court, and that default of said payment and mortgaged property be sold to satisfy the amount found due and costs,

and in case of such sale the defendant, Iowa-Wisconsin Bridge Company, and all persons claiming by, through or under it, may be forever barred or foreclosed of all equity of redemption," and prayed the appointment of a receiver, etc. A copy of the trust deed was attached to the bill in the usual form.

The defendant bridge company filed answer September 25, 1933, admitting the jurisdiction of the court, the execution of the trust deed and the issuance of the bonds; denying complainants' right to the appointment of a receiver; alleging that a part or all of the bonds secured by the trust deed were invalid; and praying the protection of the court. On September 26, 1933, the court appointed a receiver of all of the property of the Bridge Company with [fol. 713] direction to take immediate possession and to operate its business.

On December 5, 1935, by leave of court, Fayette D. Kendrick, a stockholder of the Bridge Company and citizen of Minnesota, intervened on behalf of defendant, himself and all other stockholders similarly situated, praying that the complainants' bill be dismissed, the bonds cancelled and the deed of trust set aside. He alleged that all of the bonds and the mortgage deed of trust were issued as a part of a fraudulent scheme, plan and conspiracy, with intent to cheat and defraud the Bridge Company and its stockholders out of their property. That the bonds and mortgage were fraudulent, without consideration, invalid and void, and were procured by John A. Thompson and his [associated] in conspiracy, officers and directors of the Phoenix Finance System, Inc., predecessors of petitioner, by dominating and controlling the Bridge Company and by acting as officers and directors of the latter. That none of the bonds had passed to innocent purchasers for value without notice. That the said John A. Thompson and his associates in conspiracy were still in control of the defendant Bridge Company and that demand by interveners to obtain relief from or through said defendant corporation would be unavailing. On November 5, 1933, the court granted the intervention.

After the filing of the petition of intervention, which by order of court was permitted to stand as an answer in behalf of the defendant, Iowa-Wisconsin Bridge Company, the interveners moved the court for permission to bring in the Phoenix Finance Corporation, holder and owner of about ninety per cent of the outstanding bonds, as a co-plaintiff with the trustees. This motion was granted. Thereafter Phoenix Finance Corporation appeared and filed answer to the petition of intervention.

[fol. 714] The Trustees filed a more complete reply to the petition of intervention as amended. The trustees filed a resistance to interveners' application for the production of books and papers of Phoenix Finance Corporation. The court entered an order that the Phoenix Finance Corporation produce all of its books and records pertaining to the business and affairs of the Iowa-Wisconsin Bridge Company, but such books, records and papers were never produced.

On December 3, 1934, all counsel for the parties agreeing, the court appointed a special master to hear all the issues and report his findings of fact and conclusions of law. The Master after taking the evidence, filed his report the 15th day of March 1936, to which all parties filed exceptions, including the Phoenix Finance Corporation. A hearing was had on the exceptions before the court and on the 1st day of December, 1936, the court entered its decree: "that the mortgage and bonds in suit were fraudulently issued: that all bonds are without consideration with the exception of the bonds aggregating $15,000.00", which were specified, and those bonds were other than those held by the Phoenix Finance Corporation.

That on or about the 7th day of March, 1932, while the said John A. Thompson and his associates dominated and controlled the Bridge Company, they caused a resolution to be passed at a meeting of the Board of Directors of said company to re-purchase a certain lease agreement and to pay therefor to Helmer N. Anderson the sum of $6,000, and to deliver in lieu of cash to said Helmer N. Anderson in consideration therefor bonds of the company in the sum

of $7400. That said bonds were delivered and that they were a part of the aforesaid $200,000 bond issue. That the aforesaid United States District Court, in its decree allowed $6000 as the consideration received on said $7400 of bonds, and disallowed the balance, and that said bonds allowed to the extent of $6000 are part of the bonds allowed by the court in the aggregate sum of $15,000 aforesaid. That two of said Anderson bonds, according to the record, bear the numbers 93 and 97. That whether plaintiff in this action is the owner and holder of such bonds this affiant is unable to state and therefore denies the same. That the [fol. 715] amount payable on said Helmer N. Anderson bonds has been fully adjudicated and settled by the judgment and decree of said court, a copy of which is hereto attached, marked Exhibit "A", and made a part hereof.

That the decision of the trial court is reported in 19 Fed. Supp. 127. That from the decision of the trial court the plaintiff, including the Phoenix Finance Corporation, took an appeal to the Circuit Court of Appeals, which court affirmed the decision of the trial court, and its decision is reported in 98 Fed. (2d), 416. That the Phoenix Finance Corporation filed a petition for certiorari in the United States Supreme Court, which was denied.

That all the bonds held by the Phoenix Finance Corporation were decreed to be without consideration and fraudulent. That the rights of every other bondholder were determined and adjudicated by said decree, and that the plaintiff does not hold any bond that was not determined and adjudicated by said decree, and that the plaintiff is estopped from maintaining this action.

That by reason thereof the alleged cause of action now demanded on by the plaintiff and has been fully adjudicated and settled, by said judgment and decree, and that the same is now res adjudicata, and the plaintiff, Phoenix Finance Corporation, is estopped from maintaining this action.

IRENE M. BELL.

Sworn to and subscribed the day and year aforesaid before me.

(Notarial Seal)

F. T. BARRETT,
Notary Public in and for
Cerro Gordo County, Iowa.

My Commission expires July 4, 1942.

[fol. 716] (Note by the clerk of the District Court: The final decree of the District Court, dated December 1, 1936, which is made a part of original Exhibit SC-105, is omitted here because it is the same as Exhibit "C" which is a part of the Supplemental and Ancillary Bill of Complaint, and appears at folio pages 77 to 79 of this transcript.)

[fol. 717] In the Superior Court of the State of Delaware.
In and For New Castle County.

September Term, 1939.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 79. vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

Oct. 18, 1939. Defendant's attorney moves to stay proceedings until a final disposition of the cause pending in the District Court of the United States for the Northern District of Iowa. Argument on motion before Speakman, J. Briefs to be submitted.

On motion of D. Wolcott, Esq. and order of Court, time for filing pleas extended to Nov. 20, 1939.

Nov. 20, 1939. On motion of defendant's attorney and order of Court time for filing pleas is extended to Jan. 2, 1940.

Jan. 2, 1940. Defendant pleads, with copy, to Narr.

Rule reps and issues by first general rule day in February.

[fol. 718] In the Superior Court of the State of Delaware, In and For New Castle County.

September Term, 1939.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 79. vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

Now Comes the defendant, Iowa-Wisconsin Bridge Company, the defendant above named, by Southeriand, Berl, Potter & Leahy, its attorneys, and files the following pleas to each and every count of the plaintiff's declaration filed herein:

1. Non est factum.

2. Payment.

3. Set-off.

4. Statute of Limitations.

5. And for a further plea to each and every count of the said declaration filed by the plaintiff, the defendant, by its said attorneys, says, Actio Non, because the defendant says that the subject matter of the plaintiff's said suit is res adjudicata, in that on or about the fifth day of January, A. D. 1937, in a certain cause pending in the United States District Court for the Northern District of Iowa, between the plaintiff in the above entitled cause as one of the complainants, and the defendant in the above entitled cause as one of the defendants, entitled "First Trust and Savings Bank (formerly Bechtel Trust Company) and A. H. Schubert, as Trustees, and Phoenix Finance Corporation, Complainants, vs. Iowa-Wisconsin Bridge Company and Fayette D. Kendrick, et al., interveners," a decree was entered in said United States District Court for the

Northern District of Iowa, being a Court having jurisdiction of the parties and subject matter therein, in favor of the said Iowa-Wisconsin Bridge Company and against the [fol. 719] complainants therein, after a hearing on the merits; that, thereafter, to-wit, on or about the eighth day of August, A. D. 1938, a decree affirming the decree of the said United States District Court for the Northern District of Iowa was entered by the Circuit Court of Appeals of the United States, Eighth Circuit, after hearing said cause on appeal from the United States District Court for the Northern District of Iowa; that, thereafter, to-wit, at the October Term, A. D. 1938, the Supreme Court of the United States denied a petition for certiorari seeking to review the decree of affirmance of the Circuit Court of Appeals of the United States, Eighth Circuit; that the plaintiff in the above entitled cause is the same party as the complainant Phoenix Finance Corporation in said action in the United States District Court for the Northern District of Iowa and is acting in the same capacity; that the issues in the above entitled cause are identical with issues decided against said plaintiff in said action in the United States District Court for the Northern District of Iowa; and that said decree rendered in the United States District Court for the Northern District of Iowa, is still in full force and effect, and this the defendant is ready to verify.

SOUTHERLAND, BERL, POTTER & LEAHY,

Attorneys for Defendant.

[fol. 720] In the Superior Court of the State of Delaware, In and For New Castle County.

September Term, 1939.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 79. vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

Jan. 19, 1940. Plaintiff enters reps & issues to first and fourth pleas but [delines] to reply to the second and third pleas until same are drawn out. Rule same drawn out by second general rule day in February. As to the fifth plea, plaintiffs enters similiter.

[fol. 721] In the Superior Court of the State of Delaware, In and For New Castle County.

September Term, 1939.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 79. vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

Now Comes the plaintiff, by Marvel & Morford, its attorneys, and enters reps and issues to the first and fourth pleas of the defendant heretofore filed in the above stated cause, the same being the pleas of non est factum and Statute of Limitations respectively, and declines to reply to the second and third pleas of the defendant, the same being the pleas of payment and set-off respectively, until said pleas be drawn out, and rules that said pleas be drawn out by the next general rule day.

And the said plaintiff, by its said attorneys, as to the fifth plea of the defendant heretofore filed in the above stated cause says precludi non, because it says that the issues in the above entitled cause are not identical with issues decided against the plaintiff in said action in the United States District Court for the Northern District of Iowa, that the plaintiff was not such a party to said cause that a valid adjudication could be made against it, and that the said United States District Court for the Northern District of Iowa was without jurisdiction to adjudicate against the plaintiff on any issue involved in the above

stated cause, and of this the said plaintiff puts itself upon the country.

MARVEL & MORFORD,
Attorneys for Plaintiff.

Filed in the District Court March 20, 1940.

[fol. 722] (Exhibit SC-106.)

Law Offices

Bradshaw Fowler Proctor & Fairgrave
Suite 510 Crocker Building
Des Moines, Iowa

July 25, 1935.

Mr. J. W. Kindig,
Sioux City, Iowa.

Dear Sir:

Re: First Trust and Savings Bank
(Formerly Bechtel Trust Co.)
vs.
Iowa-Wisconsin Bridge Company

During the hearing in Des Moines, you requested that counsel supply you with a brief on the question of transactions between corporations having a common directorate. I have prepared such a memorandum and submit it for your review.

I think it may fairly be said that the authorities controlling lay down these general propositions:

1. That transactions between corporations having a common directorate are presumed to be valid, unless a prima facie showing is made of fraud; unfair or dishonest advantage has been taken by one corporation of the other.

2. If a prima facie case of dishonest dealing or fraud is made, the burden of proving the validity of a transaction between corporations having a common directorate shifts to the one asserting the validity.

3. That in any event, where the transaction has been approved or ratified by the stockholders, the validity of a transaction between corporations having common directorates will be accorded the same dignity as any transaction between corporations having uncommon directors.

It is to be remembered at all times in the instant case that the validity of the mortgage deed of trust and the several bonds issued thereunder is being asserted by the trustees under the mortgage deed of trust and not by the Phoenix Finance Corporation. Hence, we do not have a situation involving the validity of a transaction between corporations having a common directorate in this case.

Under the present state of the pleadings and the record evidence, the minutes of the proceedings of the several directors' and stockholders' meetings of the Iowa-Wisconsin Bridge Company and the books of the Iowa-Wisconsin Bridge Company are entitled to full faith and credit (until impeached) and abundantly satisfy the requirement of proof as to the validity of the mortgage deed of trust and the bonds issued thereunder.

Very truly yours,

REX FOWLER.

RHF/MT

(Enc.)

cc—Fred A. Ontjes, Mason City, Iowa.

cc—H. Haehlen, Waukon, Iowa.

Filed in the District Court March 20, 1940.

[fol. 723] (Exhibit SC-107.)

Iowa-Wisconsin Bridge Company

Lansing, Iowa

March 15, 1932.

Phoenix Finance System, Inc.
Des Moines, Iowa.

Gentlemen:

Pursuant to Resolution of the Board of Directors of the Iowa-Wisconsin Bridge Company, I am delivering to

you herewith Series "A" Bonds, Nos. 1 to 97 inclusive of the Iowa-Wisconsin Bridge Company, in the principal amount of $97,000.00 to reimburse you for funds advanced the Iowa-Wisconsin Bridge Company to complete the construction of the Black Hawk Toll Bridge at Lansing, Iowa as follows:

March 10, 1931	$50,000.00
September 25, 1931	10,000.00
November 11, 1931	9,000.00
December 24, 1931	11,262.71
Interest to 12-31-31	3,548.56
	83,811.27

To reimburse the Phoenix Finance System, Inc. for these items on the basis of an 8% yield, will require bonds in the face amount of $96,538.58. In view of the fact that bonds in the principal amount of $97,000.00 are being delivered to Phoenix Finance System, Inc. the over-plus of $461.42 will be charged against the Phoenix Finance System, Inc. on the books of the company.

By the acceptance of said bonds, Phoenix Finance System, Inc. acknowledges full payment of the items herein enumerated and further agrees to execute and deliver Satisfaction of Mortgage in the amount of $50,000.00 which was executed on or about March 10, 1931, by Iowa-Wisconsin Bridge Company to Phoenix Finance System, Inc. to secure the payment of a promissory note in that amount of even date. The said Satisfaction of Mortgage will be accepted by Iowa-Wisconsin Bridge Company and held subject to reinstatement upon the occurrence of the contingencies referred to in the Resolution of the Board of Directors of Iowa-Wisconsin Bridge Company adopted at its meeting at Lansing, Iowa on December 22, 1931.

Very truly yours,

IOWA-WISCONSIN BRIDGE COMPANY,
By Oscar R. Thorson,
Secretary-Treasurer.

P. S. Bonds Nos. 1 to 97 inclusive as delivered herein are listed on the back of this letter.

[fol. 724] March 15, 1932.

Iowa-Wisconsin Bridge Company,
Lansing, Iowa.

Attention—Mr. Oscar R. Thorson, Secy.

Gentlemen:

Receipt is hereby acknowledged of Series "A" Bonds, Nos. 1 to 97 inclusive, of Iowa-Wisconsin Bridge Company in reimbursement of moneys due Phoenix Finance System, Inc. from said Iowa-Wisconsin Bridge Company as enumerated in your letter of March 12, 1932.

There is submitted herewith Satisfaction of the Mortgage executed by Iowa-Wisconsin Bridge Company to Phoenix Finance System, Inc. on or about March 10, 1931 to secure a promissory note of $50,000.00 of even date, which said Satisfaction of Mortgage is delivered on the express condition that it will be accepted subject to reinstatement in the event of the occurrence of the contingencies referred to in the Resolution of the Board of Directors of Iowa-Wisconsin Bridge Company, adopted at its meeting at Lansing, Iowa, on December 22, 1931.

Yours very truly,

PHOENIX FINANCE SYSTEM, INC.
By M. K. Thompson,
Secretary-Treasurer.

MKT:DO

Filed in the District Court March 20, 1940.

[fol. 725] (Exhibit SC-108)

March 15, 1932.

Iowa-Wisconsin Bridge Company,
Lansing, Iowa.

Attention—Mr. Oscar R. Thorson, Secy.

Gentlemen:

Receipt is hereby acknowledged of Series "A" Bonds, Nos. 1 to 97 inclusive, of Iowa-Wisconsin Bridge Company

in reimbursement of moneys due Phoenix Finance System, Inc. from said Iowa-Wisconsin Bridge Company as enumerated in your letter of March 12, 1932.

There is submitted herewith Satisfaction of the Mortgage executed by Iowa-Wisconsin Bridge Company to Phoenix Finance System, Inc. on or about March 10, 1931 to secure a promissory note of $50,000.00 of even date, which said Satisfaction of Mortgage is delivered on the express condition that it will be accepted subject to reinstatement in the event of the occurrence of the contingencies referred to in the Resolution of the Board of Directors of Iowa-Wisconsin Bridge Company, adopted at its meeting at Lansing, Iowa, on December 22, 1931.

Yours very truly,

PHOENIX FINANCE SYSTEM, INC.

By

Secretary-Treasurer.

MKY:DO

Filed in the District Court March 20, 1940.

[fol. 726] (Exhibit SC-109.)

March 11, 1931.

Standard Shares Holding Company,
Minneapolis, Minnesota.

Gentlemen:

You are notified that the sales of the capital stock of the Iowa-Wisconsin Bridge Company have failed to bring in funds sufficient to proceed with the construction of the Black Hawk Bridge as desired.

Your interests, as well as ours, will be benefitted by the making of a loan with the Phoenix Finance System, Inc., in order to provide funds to facilitate the completion of this bridge. The Phoenix Finance System, Inc., will loan us Fifty Thousand Dollars ($50,000.00) if we will secure them as best we can, and referring to the Managing Directors Contract bearing date of November 26, 1930, between your company and ours we find that we have agreed not

to create any obligations against the Iowa-Wisconsin Bridge Company or its personal or real property without your approval.

We therefore respectfully suggest that in consideration of the benefits to be derived through this loan and through the early completion of the bridge resulting from said loan, which will improve your interests and increase the value of your contract, that you consent to the borrowing of Fifty Thousand Dollars ($50,000.00) by the Iowa-Wisconsin Bridge Company from the Phoenix Finance System, Inc. and the pledging of all of the property of the Iowa-Wisconsin Bridge Company to secure said loan.

Very truly yours,

IOWA-WISCONSIN BRIDGE COMPANY,
By Oscar R. Thorson,
Treasurer.

Seal
ORT:MW

Pursuant to resolution of our Board of Directors, copy of which is hereto attached, we hereby authorize and approve the loan above mentioned in which the Iowa-Wisconsin Bridge Company will do all things necessary to secure the payment of the Fifty Thousand Dollar ($50,000.00) loan to the Phoenix Finance System, Inc. and to discharge said obligation in full according to the requirements of said Phoenix Finance System, Inc.

STANDARD SHARES HOLDING COMPANY,
By John W. Shaffer,
President.

(Seal)

[fol. 727] "Upon motion duly made, seconded and unanimously carried the following resolution was adopted:

Whereas, notice has been received from the Iowa-Wisconsin Bridge Company that it is necessary and desirable that it borrow Fifty Thousand Dollars ($50,000.00) to facilitate the completion of the Black Hawk Bridge, and

Whereas, said notice has been read in this meeting and copy of same has been ordered attached to these minutes,

Now Therefore Be It Resolved, That the President of Standard Shares Holding Company be and he is hereby authorized to execute for and in behalf of this corporation full consent and approval authorizing the Iowa-Wisconsin Bridge Company to do all things necessary in its discretion to secure and pay off said loan according to such terms as it is able to effect with the Phoenix Finance System, Inc."

I, M. E. Lockbart, on oath depose and say that the above is a true and correct copy of a certain resolution adopted by the Board of Directors of Standard Shares Holding Company in special meeting held on the 14th day of March, A. D. 1931, at which meeting I was present and acted as Secretary.

M. E. LOCKHART. (signed)

Subscribed and sworn to before me by the above mentioned M. E. Lockhart this 21st day of March, 1931.

(Notarial Seal)

PERRY E. CROSIER (signed)
Notary Public in and for Hennepin County, Minn.

[Seal]

Filed in the District Court March 20, 1940.

EXHIBIT SC-112.

PHOENIX FINANCE SYSTEM

IN GENL. PAYMENT OF

Note

No. 449. ~~450~~

PAY TO THE ORDER OF

CLEVELAND, OHIO 2/11 1931

Iowa Wisconsin Bridge Co

$ 35000

Thirty Five Thousand & 00

DOLLARS

~~Union Trust~~

MAIN OFFICE

CLEVELAND, OHIO

EXHIBIT 28-T

JUL 16 1935

HARRY E. BEACH, REPORTER

PHOENIX FINANCE SYSTEM, INC.

By W. Thompson

PRES.-SEC'Y

Pay to the order of
Robt. W. Schaffner Co.
Iowa-Wisconsin Bridge Co
By Owen P. Thomas
Treasurer.

Pay to the order of
Thompson & Co.
Robt. W. Schaffner Co.
By Jack Woodruff

Pay to the order of
Phoenix Finance System, Inc.

THOMPSON & CO.
By W. Thompson
Asst. Secy-Treas.

For Deposit only
Phoenix Finance System, Inc.
By W. Thompson
Secy-Treas.

EXHIBIT SC-113.

THOMPSON & CO.

FOR PAYMENT note

No. 448 ~~46~~

CLEVELAND, OHIO 3/11 1931

Iowa Wisconsin Bridge Co $15000/00

Fifteen Thousand & no/100 DOLLARS

~~THOMPSON & CO.~~

PHOENIX FINANCE SYSTEM INC.

BY J. A. Thompson PRES.

THE UNION TRUST

MAIN OFFICE

CLEVELAND, OHIO

6-10

EXHIBIT D-17
JUL 16 1935
HARRY E. BEAM, REPORTER

Pay to the order of
Thompson & Co
Iowa-Wisconsin Bridge
Ray Adam P. Rumm

Pay to the order of
Phoenix Finance System, Inc
THOMPSON & CO.
By J. A. Thompson
Mary E. Boyce Treas.

For deposit only
Phoenix Finance System, Inc.
By Mary E. Boyce Sec'y-Treas.

[fol. 730] (Exhibit SC-114.)

Receipts and Disbursements.

Iowa-Wisconsin Bridge Company—Lansing, Iowa

From November 1, 1930 to September 25, 1933.

[fol. 731] Contents.

Accountants' Report.....

Schedule A—Summary of Cash Transactions.....

Schedule B—Summary of Account with Thompson & Co. .....

Schedule C—Summary of Account with Phoenix Finance System, Inc. .....

Schedule D—Summary of Account with Phoenix Finance Corporation.....

Schedule E—Summary of All Accounts with Phoenix Group.....

Schedule F—Interest to December 31, 1939 on Unpaid Advances by Phoenix Group.....

Schedule G—Capital Stock Transactions.....

Detail of Cash Receipts.....

Detail of Cash Disbursements.....

[fol. 732] Ernst & Ernst
Accountants and Auditors
System Service
Chicago

Continental Illinois Bank Bldg.

Akron
Atlanta
Baltimore
Birmingham
Boston
Buffalo
Canton
Chicago
Cincinnati
Philadelphia
Pittsburg
Portland, Me.
Providence
Reading
Richmond
Rochester
St. Louis
St. Paul

Cleveland
Columbus
Dallas
Dayton
Denver
Detroit
Fort Worth
Grand Rapids
Houston
Indianapolis
Kalamazoo
Kansas City
Los Angeles
Louisville
Memphis
Miami
Milwaukee
Minneapolis
New Orleans
New York
San Antonio
San Francisco
Seattle
Toledo
Washington
Winston-Salem
Youngstown

Toronto, Canada

Correspondents At
London
Paris
Berlin
Hamburg
Antwerp

Cable Address
"Ernstaudit" N. Y.

January 17, 1940.

Phoenix Finance Corporation,
St. Petersburg, Florida.

Gentlemen:

We have examined the records pertaining to the cash receipts and disbursements of the Iowa-Wisconsin Bridge Company, a Delaware corporation, hereinafter referred to as the Bridge Company, for the period commencing November 1, 1930 and ending at the close of business September 25, 1933, the latter being the last business day prior to the appointment of a receiver for the bridge property.

In connection with this examination, the cash receipts shown by the records to have been deposited in the Company's bank accounts were traced by us to and compared with the record of bank deposits shown in bank statements or actual bank records; and we also traced and confirmed by examination of supporting evidence such of said cash receipts as were not shown to have been deposited in the bank accounts of the Bridge Company, but which were recorded as having been paid over by endorsement by the Bridge Company directly to creditors or other parties.

In the detailed schedules of receipts and disbursements attached hereto, we have identified by the mark "(C)" the seven checks which were received by the Bridge Company, not deposited in the bank, but endorsed and transferred over to creditors and charged against the accounts of said creditors upon the Bridge Company books.

In connection with the cash disbursements, we examined all of the canceled checks except a minor group totaling $1,994.37 represented by a large number of very small checks disbursed in connection with the operation of the oil station at the bridge. These particular checks were not immediately available for inspection.

We examined the records of the Bridge Company pertaining to transactions and accounts with Thompson & Co., Phoenix Finance System, Inc., and Phoenix Finance Corporation, hereinafter referred to as the Phoenix Group and found corresponding entries in the books of the Phoenix Group recording these transactions.

[fol. 733] We have examined the records pertaining to the capital stock transactions of the Bridge Company and have prepared an analysis of these transactions, which analysis is set forth in summary form in an accompanying schedule.

The interest on unpaid advances to the Bridge Company by the Phoenix Group as shown in Schedule F was not recorded on the books of the Bridge Company but has been independently computed on the basis provided in the financing agreement between Phoenix Finance System, Inc. and the Bridge Company.

Our examination was of such scope and in such detail as we considered necessary to determine the facts in respect of the receipts and disbursements of the Bridge Company and the transactions with the Phoenix group for the period beginning November 1, 1930 and ending September 25, 1933, and based upon such examination, as outlined herein, it is our opinion that the attached schedules set forth correctly the aforementioned transactions.

ERNST & ERNST,
Certified Public Accountants.

[fol. 734]

Schedule A

Summary Of Cash Transactions

Iowa-Wisconsin Bridge Company

From November 1, 1930 to September 25, 1933

Total Cash Transactions	
Cash received by Bridge Company (Page 21, Col. 1)	$454,996 74
Cash disbursed by Bridge Company (Page 56, Col. 1)	454,255 65
Cash balance September 25, 1933	$ 741 09
Source Of Cash Receipts	
From Trustee assets (Page 21, Col. 5)	$ 74,403 48
From Standard Shares Holding Co.—on account (Page 21, Col. 4)	5,081 57
From other assets (Page 21, Col. 6)	11,472 69
From cash income (Page 21, Col. 2)	45,897 15
From Phoenix Group (Page 21, Col. 3)	318,141 85
Total Cash Received—as shown above	$454,996 74
Disbursement Of Cash	
Paid to Shaffer & Co. on four contracts (Page 56, Col. 3)	$ 96,044 96
Paid for other construction (Page 56, Col. 4)	59,900 02
Paid for expenses, etc. (Page 56, Col. 6)	64,837 92
Paid to stockholders (Page 56, Col. 7)	12,445 06
Paid to Standard Shares Holding Co. on account (Page 56, Col. 5)	7,624 81
Paid to Phoenix Group (Page 56, Col. 2)	213,402 87
Total Cash Disbursed—as shown above	$454,255 65
Summary Of Transactions With Phoenix Group	
Total cash received from Phoenix Group	$318,141 85
Total cash paid to Phoenix Group	213,402 87
Net Cash Received From Phoenix Group	$104,738 98
Less net credit to Bridge Company for other (non-cash) items transferred to Phoenix Group as detailed in Schedules B, C, D and E	6,389 52
Balance Due To Phoenix Group (Exclusive of interest)	$ 98,349 46

[fol. 735]

Schedule B

Summary Of Account With Thompson & Co.

Iowa-Wisconsin Bridge Company

From November 1, 1930 to September 25, 1933

				Cash	Non-Cash	Total
Receipts By Bridge Company						
From Thompson & Co.						
		Total cash on account		$208,710 85		$208,710 85
Nov.	5-1930	For capital stock at $100.00 per share		7,500 00	)	
Dec.	30-1931	For capital stock at $100.00 per share		17,000 00	)	24,500 00
Nov.	1-1930	Notes and collateral on stock subscriptions	$5,410 84			
Dec.	31-1930	Discount on above capital stock — 15%	3,675 00			
Mar.	18-1931	By charge to Standard Shares Holding Co.	200 00			
July	25-1931	By Harger deposit at Kerndt Bank	50 00			
Mar.	29-1931	By travel expense paid	45 39			
June	30-1931	do	330 79		$ 9,712 02	9,712 02
		Totals — Thompson & Co. To Bridge Company		$233,210 85	$ 9,712 02	$242,922 87
Disbursements By Bridge Company						
To Thompson & Co.						
		Total cash on account		$213,402 87		$213,402 87
June	24-1931	Toll books	$5,010 00			
Jan.	1-1931	Gunbus account	10 00		$ 5,020 00	5,020 00
Dec.	31-1930	245 shares of capital stock			24,500 00	24,500 00
		Totals — Bridge Company To Thompson & Co.		$213,402 87	$ 29,520 00	$242,922 87
		Net Balance		$ 19,807 98	$ 19,807 98*	$ —0—

* Negative amount.

[fol. 736]

Schedule C

Summary Of Account With Phoenix Finance System, Inc.

Iowa Wisconsin Bridge Company

From November 1, 1930 to September 25, 1933

Disbursements By Bridge Company						
To Thompson & Co.						
		Total cash on account		$213,402 87		$213,402 87
June	24-1931	Toll books	$5,010 00			
Jan.	1-1931	Gunbus account	10 00		$ 5,020 00	5,020 00
Dec.	31-1930	245 shares of capital stock			24,500 00	24,500 00
		Totals — Bridge Company To Thompson & Co.		$213,402 87	$ 29,520 00	$242,922 87
		Net Balance		$ 19,807 98	$ 19,807 98*	$ —0—

* Negative amount.

[fol. 736]

Schedule C

Summary Of Account With Phoenix Finance System, Inc.

Iowa-Wisconsin Bridge Company

From November 1, 1930 to September 25, 1933

			Cash	Non-Cash	Total
Receipts By Bridge Company					
From Phoenix Finance System, Inc.					
Mar.	10-1931	Cash on note and mortgage (Ck. 449)	$35,000 00		$35,000 00
Mar.	10-1931	Cash on note and mortgage (Ck. 448)	15,000 00		15,000 00
Sept.	24-1931	Cash on account (Ck. 7477)	10,000 00		10,000 00
Nov.	10-1931	Cash on account (Ck. 7852)	9,000 00		9,000 00
Dec.	24-1931	U. S. Treasury certificate		$11,262 71	11,262 71
		Total — Phoenix Finance System, Inc., To Bridge Company	$69,000 00	$11,262 71	$80,262 71

Note — On January 11, 1932 the credit balance of $80,262.71 was transferred on the books of the Bridge Company to the credit of the Phoenix Finance Corporation, successor to Phoenix Finance System, Inc.

[fol. 737]

Schedule D

Summary Of Account With Phoenix Finance Corporation

Iowa-Wisconsin Bridge Company

From November 1, 1930 to September 25, 1933

			Cash	Non-Cash	Total
Receipts By Bridge Company					
From Phoenix Finance Corporation					
Jan.	11-1932	Credit balance of Phoenix Finance System, Inc. transferred	$69,000.00	$11,262.71	$ 80,262.71
Feb.	27-1932	Cash on account (Ck. 340)	$ 1,000.00		$ 1,000.00
Dec.	15-1932	do (Ck. 1961)	2,000.00		2,000.00
Jan.	20-1933	do (Ck. 2132)	3,125.00		3,125.00
Feb.	7-1933	do (Ck. 2233)	6,896.00		6,896.00
Feb.	9-1933	do (Ck. 2243)	2,910.00		2,910.00
		Expenses of Bridge Company paid by Phoenix for twenty months including salaries, rent, etc.		$ 2,155.75	$ 2,155.75
			$15,931.00	$ 2,155.75	$ 18,086.75
		Total — Phoenix Advances To Bridge Company	$84,931.00	$ 13,418.46	$ 98,349.46
Add Additional Credits					
		Accrued interest on advances		3,548.56	3,548.56
		Discount on first mortgage bonds		12,727.31	12,727.31
		To balance account for first mortgage bonds issued		109.86	109.86
		Total Credits To Phoenix	$84,931.00	$29,804.19	$114,735.19
Liquidation Of Cash Advances And Other Credits Due Phoenix Finance Corporation					
Mar.	15-1932	By issue of first mortgage bonds			$ 97,000.00
Dec.	15-1932	By issue of note payable to Phoenix			2,000.00
Dec.	31-1932	do			500.00
Jan.	20-1933	do			3,125.00
July	7-1933	do			12,110.19
		Total Obligations Issued To Phoenix			$114,735.19

[fol. 738]

Schedule E

Summary Of All Accounts With Phoenix Group

Iowa-Wisconsin Bridge Company

From November 1, 1930 to September 25, 1933

Liquidation Of Cash Advances And Other Credits Due Phoenix Finance Corporation

Mar.	15-1932	By issue of first mortgage bonds	$ 97,000.00
Dec.	15-1932	By issue of note payable to Phoenix	2,000.00
Dec.	31-1932	do	500.00
Jan.	20-1933	do	3,125.00
July	7-1933	do	12,110 19
		Total Obligations Issued To Phoenix	$114,735.19

[fol. 738]

Schedule E

Summary Of All Accounts With Phoenix Group

Iowa-Wisconsin Bridge Company

From November 1, 1930 to September 25, 1933

	Cash	Non-Cash	Total
Receipts By Bridge Company			
From Phoenix Group			
From Thompson & Co.	$233,210.85	$ 9,712 02	$222,922.87
From Phoenix Finance System, Inc.	69,000 00	11,262 71	80,262 71
From Phoenix Finance Corporation	15,931 00	2,155 75	18,086 75
Totals — Phoenix Group To Bridge Company	$318,141.85	$23,130 48	$341,272.33
Disbursements By Bridge Company			
To Phoenix Group			
To Thompson & Co.	$213,402 87	$29,520 00	$242,922.87
To Phoenix Finance System, Inc.	—0—	—0—	—0—
To Phoenix Finance Corporation	—0—	—0—	—0—
Totals — Bridge Company To Phoenix Group	$213,402.87	$29,520 00	$242,922 87
Balance Due Phoenix Group (exclusive of interest)	$104,738 98	$ 6,389.52*	$ 98,349 46

* Negative amount.

[fol. 739]

Schedule F

Interest To December 31, 1939 On Unpaid Advances By Phoenix Group

Iowa-Wisconsin Bridge Company

From March 10, 1931 to December 31, 1939

		Amount of Advances	Accumulated Interest Per Cent	Amount of Interest	
Interest from Mar.	10–31 on	$50,000.00	70.44%	$35,220.00	
Interest from Sept.	24–31 on	10,000.00	66.13%	6,613.00	
Interest from Nov.	10–31 on	9,000.00	65.11%	5,859.90	
Interest from Dec.	24–31 on	11,262.71	64.13%	7,222.77	$54,915.67
Interest from Feb.	27–32 on	1,000.00	62.00%	$ 620.00	
Interest from Dec.	15–32 on	2,000.00	56.16%	1,123.20	
Interest from Jan.	20–33 on	3,125.00	55.66%	1,739.37	
Interest from Feb.	7–33 on	6,896.00	55.18%	3,805.21	
Interest from Feb.	9–33 on	2,910.00	55.13%	1,604.28	
Interest from June	30–32 on	650.00	60.00%	390.00	
Interest from Dec.	31–32 on	1,205.75	56.00%	675.22	
Interest from June	30–33 on	300.00	52.00%	156.00	10,113.28
				Total Interest	$ 65,028.95

Interest computed herein at 8% rate as provided in the financing agreement between Phoenix Finance System, Inc. and the Bridge Company.

Total Principal And Interest On Unpaid Advances By Phoenix Group

Principal amount of net advances as shown in Schedule E	$ 98,349.46
Interest to December 31, 1939 as shown above	65,028.95
	$163,378.41
Less interest previously paid to Phoenix	9,390.00
Net Total Due To Phoenix Group On Principal And Interest	$153,988.41

The foregoing amount of $153,988.41 does not include any of the $77,345.00 principal or $55,584.60 interest claimed by Thompson & Co. by reason of the 1,091 shares of Bridge Company stock unsold under the fiscal contract or the $60,500.00 of first mortgage bonds issued in connection with the return of 517 shares of said stock.

July	7-1933	Retired by Resolution	$ 3,800.00
Sept.	25-1933	In treasury account	64,550.00
Sept.	25-1933	Unissued	6,450.00
		Authorized But Not Outstanding	74,800.00
		Total Authorized And Accounted For	$750,000.00

[fol. 741]

Summary Of Capital Stock Transactions

Shares		
3,509½	Issued prior to November 1, 1930	$350,950.00
3,550	Issued to Shaffer & Co. on four contracts	355,000.00
140	Issued to Phoenix on financing agreement	14,000.00
17	Issued for other purchases	1,700.00
245	Issued to Phoenix Group for cash	24,500.00
4	Issued to the public for cash ($398.50)	400.00
7,465½	Total	$746,550.00
713½	Less reacquired	71,350.00
6,752	Outstanding at September 25, 1933	$675,200.00

All shares treated as of $100.00 per share; the Class A of 3,750 shares having a par value of $100.00 per share and the Class B being of no par value with a stated value of $100.00 per share.

A further $400,000.00 of capital stock was also issued to Standard Shares Holding Co. prior to November 1, 1930 but it was later returned to the Bridge Company.

[fol. 740]

Schedule G

Capital Stock Transactions

Iowa-Wisconsin Bridge Company

From inception to September 25, 1933

Oct. 31-1930	Issued through Trustee prior to November 1, 1930			$350,950.00
Additional Shares Issued Or Reissued After October 31, 1930				
Nov. 1-1930	To Phoenix for finance agreement	$ 14,000.00		
Nov. 5-1930	To Thompson Co. for cash	7,500.00		
Nov. 24-1930	To Shaffer & Co. on substructure contract	10,000.00		
Nov. 26-1930	To Shaffer & Co. on superstructure contract	320,000.00		
Dec. 4-1930	To J. J. Dunlevy for right-of-way	800.00		
Dec. 24-1930	To Shaffer & Co. on substructure contract	5,000.00		
Dec. 31-1930	To Thompson & Co. for cash	17,000.00		
Feb. 17-1931	To Duxbury and Duxbury for cash ($398.50)	400.00		
June 22-1931	To Fred Schaefer for franchise	400.00		
Aug. 6-1931	To Shaffer & Co. on superstructure extras	20,000.00		
Dec. 31-1931	To Julius Boeckh for franchise	500.00		395,600.00
		Total		$746,550.00
Reacquired Upon Cancellation Of Stock Subscriptions, etc.				
Jan. 16-1931	S. and J. Hart	$ 200.00		
Jan. 20-1931	Arthur E. Brown	500.00		
Jan. 31-1931	Erick Eastman	600.00		
Feb. 6-1931	McStorlie	1,200.00		
Feb. 18-1931	P. B. Amunson (via Thompson & Co.)	3,200.00		
Mar. 17-1931	Laura Baker	2,000.00		
Apr. 27-1931	Frank Sparker	600.00		
May 6-1931	Wm. Krick	500.00		
July 11-1931	John Benson	500.00		
Dec. 26-1931	H. T. Wagner	2,000.00		
Dec. 28-1931	W. H. Schofield	1,000.00		
Jan. 31-1932	J. M. Westerman	250.00		
Feb. 4-1932	M. Boylston	200.00		
Mar. 15-1932	Phoenix Finance Corp.	51,700.00		
Apr. 23-1932	J. W. Dempsey	600.00		
Apr. 30-1932	Laura Baker	2,500.00		
July 6-1933	O. S. Bailey	100.00		
July 6-1933	Gilman Borgen	400.00		
July 6-1933	Anna O. Dahle	1,200.00		
July 6-1933	H. P. Hansen	1,600.00		
July 6-1933	J. F. Jesse	300.00		
July 6-1933	Geo. J. Werner	200.00		
	Total Reacquired (Book Cost $70,654.70)			71,350.00
	Total Outstanding September 25, 1933			$675,200.00

Date		Received From	Amount	Account Credited	Gross Income	From Phoenix Group	From S.S.H.Co. On Account	From Trustee Assets	From Other Assets
1930									
Oct.	31	Standard Shares Holding Co.	$ 2,500.00	Trustee Settlement				$ 2,500.00	
	31	Standard Shares Holding Co.	2,754.00	Trustee Settlement				2,754.00	
Nov.	4	Thompson & Co.	2,000.00(C)	Thompson & Co.		$ 2,000.00			
	5	Standard Shares Holding Co.	1,000.00	Standard Shares			$ 1,000.00		
	5	Thompson & Co.	7,500.00	Capital stock		7,500.00			
	5	F. J. Hartman	5,000.00	Bills receivable				5,000.00	
	7	Thompson & Co.	1,000.00	Thompson & Co.		1,000.00			
	8	Joe Bechtel	9.00	Interest				9.00	
	8	Christ Weber	100.00	Bills receivable				100.00	
	10	A. M. Schanke (Bronson deal)	426.00	Stocks and bonds				426.00	
	10	Sprague Bank	104.00	C. D. and interest				104.00	
	10	Onsgard Bank	52.29	C. D. and interest				52.29	
	10	Decorah Bank	310.50	C. D. and interest				310.50	
	10	Standard Shares Holding Co.	4,256.30	C. D. and interest				4,256.30	
	12	Standard Shares Holding Co.	500.00	Standard Shares			500.00		
	12	Jennie Reith	150.00	Bills receivable				150.00	
	13	Thompson & Co.	475.00	Thompson & Co.		475.00			
	13	Thompson & Co.	585.00	Thompson & Co.		585.00			
	14	H. T. Wagner	500.00	Bills receivable				500.00	
	14	A. M. Schanke & Co.	98.00	Stocks and bonds				98.00	
	14	Decker Packing Co.	2,190.00	Stocks and bonds				2,190.00	
	15	Kerndt Bank	22.01	C. D. and interest				22.01	
	15	Peoples Bank	107.32	C. D. and interest				107.32	
	17	Wayne F. Johnson	15.00	Interest				15.00	
	17	Chas. Hanson (Olson-Groth)	278.00	Stocks and bonds				278.00	
	18	Jacob E. Decker & Sons (Bronson)	210.00	Stocks and bonds				210.00	
	18	R. M. Schanke & Co. (Bronson)	568.00	Stocks and bonds				568.00	
	19	Decorah Bank	72.45	C. D. and interest				72.45	
	19	Sioux Valley Hospital	18.00	Stocks and bonds and interest				18.00	
	19	Rev. E. B. Christopherson	21.00	Bills receivable				21.00	
	17	Thompson & Co.	5,000.00	Thompson & Co.		5,000.00			
	20	Thompson & Co.	475.00	Thompson & Co.		475.00			
	20	Thompson & Co.	975.00	Thompson & Co.		975.00			
	21	F. W. Mejske	1,008.00	Bills receivable and interest				1,008.00	
	24	Farmers Bank	1,248.00	C. D. and interest				1,248.00	
	26	Standard Shares Holding Co.	839.28(C)	C. D. and interest				839.28	
	28	John W. Shaffer & Co.	6,000.00	P. & L. (Oil station lease)	$ 6,000.00				
	28	Standard Shares Holding Co.	17,659.69	Standard Shares (Trustee Settlement)				17,659.69	
Dec.	2	Gilland Bros.	200.00	Bills receivable				200.00	
	3	Thompson & Co.	300.00	Thompson & Co.		300.00			
	4	Thompson & Co.	1,550.00	Thompson & Co.		1,550.00			
	5	Thompson & Co.	3,000.00	Thompson & Co.		3,000.00			
	8	Thompson & Co.	2,410.00	Thompson & Co.		2,410.00			
	6	Thompson & Co.	1,500.00	Thompson & Co.		1,500.00			
	8	Thompson & Co.	900.00	Thompson & Co.		900.00			
	10	Thompson & Co.	1,000.00	Thompson & Co.		1,000.00			
	10	Thompson & Co.	1,200.00	Thompson & Co.		1,200.00			
	13	Thompson & Co.	400.00	Thompson & Co.		400.00			
	13	Thompson & Co.	6,600.00	Thompson & Co.		6,600.00			
		(Forward)	$ 85,086.84		$ 6,000.00	$ 36,870.00	$ 1,500.00	$ 40,716.84	$ —0—

Date		Received From	Amount	Account Credited	Gross Income	From Phoenix Group	From S.S.H.Co. On Account	From Trustee Assets	From Other Assets
		(Brought forward)	$ 85,086.84		$ 6.000 00	$ 36,870.00	$ 1.500.00	$ 40,716.84	$ —0—
1930									
Dec.	13	Thompson & Co.	200.00	Thompson & Co.		200.00			
	15	A. G. Plankers (Part payment)	927.50	Bills receivable and interest				927.50	
	16	Decorah Bank	1,449.00	C. D. and interest				1,449.00	
	17	Thompson & Co.	1,325.00	Thompson & Co.		1,325.00			
	18	Thompson & Co.	3,200.00	Thompson & Co.		3,200.00			
	20	Dan Goettel	102.20	Bills receivable and interest				102.20	
	19	Thompson & Co.	2,100.00	Thompson & Co.		2,100.00			
	27	H. T. Wagner	500.00	Bills receivable				500.00	
	29	Winneshiek Bank (Johnson)	207.00	C. D. and interest				207.00	
	31	Standard Shares Holding Co.	3,581.57	Standard Shares			3,581.57		
	31	Thompson & Co.	17,000.00	Capital stock		17,000.00			
	31	Dist. Courthouse	1.12	License, taxes and fees	1.12				
	31	Thompson & Co.	1,000.00	Thompson & Co.		1,000.00			
1931									
Jan.	5	Thompson & Co.	500.00	Thompson & Co.		500.00			
	6	Sioux Valley Hospital Assn. (#142 Groth)	30.00	Stocks and bonds and interest				30.00	
	6	Schoenstadt & Sons, Inc.	15.00	Stocks and bonds and interest				15.00	
	6	Wesley M. E. Church (#6, 7, 27 Groth)	75.00	Stocks and bonds and interest				75.00	
	6	Thompson & Co.	200.00	Thompson & Co.		200.00			
	8	A. C. Kandall	106.03	Bills receivable and interest				106.03	
	8	Thompson & Co.	200.00	Thompson & Co.		200.00			
	8	Thompson & Co.	1,100.00	Thompson & Co.		1,100.00			
	9	Frank Larson (#91 Olson)	80.00	Stocks and bonds				80.00	
	9	Thompson & Co.	25,000.00	Thompson & Co.		25,000.00			
	9	Thompson & Co.	1,400.00	Thompson & Co.		1,400.00			
	9	Thompson & Co.	375.00	Thompson & Co.		375.00			
	9	Thompson & Co.	600.00	Thompson & Co.		600.00			
	10	McNeal & Company (Agnes Darling)	242.75	Stocks and bonds				242.75	
	10	Thompson & Co.	2,800.00	Thompson & Co.		2,800.00			
	12	Thompson & Co.	1,000.00	Thompson & Co.		1,000.00			
	12	Thompson & Co.	1,000.00	Thompson & Co.		1,000.00			
	12	National Bank (Johnson)	400.00	C. D.				400.00	
	12	National Bank (Seim)	150.00	C. D.				150.00	
	13	Sherman Hart	15.00	Bills receivable				15.00	
	13	Winneshiek Bank (Johnson)	931.50	C. D. and interest				931.50	
	13	Palisades Bank (Pieper)	676.00	C. D. and interest				676.00	
	13	Thompson & Co.	700.00	Thompson & Co.		700.00			
	13	Thompson & Co.	1,300.00	Thompson & Co.		1,300.00			
	14	Thompson & Co.	550.00	Thompson & Co.		550.00			
	15	Thompson & Co.	300.00	Thompson & Co.		300.00			
	15	Thompson & Co.	400.00	Thompson & Co.		400.00			
	15	H. T. Wagner	500.00	Bills receivable				500.00	
	16	Thompson & Co.	600.00	Thompson & Co.		600.00			
	16	Thompson & Co.	500.00	Thompson & Co.		500.00			
	19	D. D. Roggensack (Part payment)	25.00	Bills receivable				25.00	
	19	Arthur C. Brown	2.84	Refund dividend				2.84	
	19	Eric Eastman	17.07	Refund dividend				17.07	
	19	Palisades Bank (Pieper)	490.00	C. D.				490.00	
	19	Thompson & Co.	800.00	Thompson & Co.		800.00			
		(Forward)	$159,761.42		$ 6.001 12	$101,020.00	$ 5,081.57	$ 47,658.73	$ —0—

Date		Received From	Amount	Account Credited	Gross Income	From Phoenix Group	From S.S.H.Co. On Account	From Trustee Assets	From Other Assets
		(Brought forward)	$159,761 42		$ 6,001 12	$101,020 00	$ 5,081 57	$ 47,658 73	$ —0—
1931									
Jan.	21	Decorah Bank (Sorenson)	103 50	C. D. and interest				103 50	
	21	Thompson & Co.	2,100 00	Thompson & Co. (See 1 29 31 $900.00)		2,100 00			
	22	Thompson & Co.	300 00	Thompson & Co.		300 00			
	22	Ellsworth Bank (Nelson)	185 40	C. D. and interest				185 40	
	24	Thompson & Co.	100 00	Thompson & Co.		100 00			
	26	Frank Larson (Olson)	80 00	Stocks and bonds				80 00	
	26	Thompson & Co.	1,300 00	Thompson & Co.		1,300 00			
	27	Thompson & Co.	600 00	Thompson & Co.		600 00			
	29	Thompson & Co.	800 00	Thompson & Co.		800 00			
	29	Thompson & Co.	500 00	Thompson & Co.		500 00			
	30	Thompson & Co.	200 00	Thompson & Co.		200 00			
	30	Frank Larson	177 50	Stocks and bonds				177 50	
	30	Onsgard Bank (Quarve)	100 00	C. D.				100 00	
	30	Onsgard Bank (Quarve)	100 00	C. D.				100 00	
	30	Onsgard Bank (Otterness)	400 00	C. D.				400 00	
	31	Frank Larson (Razeniberger)	450 00	Stocks and bonds				450 00	
	31	Decorah Bank	517 50	C. D. and interest				517 50	
Feb.	2	Thompson & Co.	709 00	Thompson & Co.		709 00			
	5	Thompson & Co.	200 00	Thompson & Co.		200 00			
	5	M. E. Strand	105 13	Bills receivable and interest				105 13	
	7	Thompson & Co.	2,680 00	Thompson & Co.		2,680 00			
	9	Onsgard Bank (Otterness)	52 00	C. D. and interest				52 00	
	9	Thompson & Co.	3,000 00	Thompson & Co.		3,000 00			
	13	M. C. Storlie	42 00	Interest				42 00	
	13	Thompson & Co.	1,900 00	Thompson & Co.		1,900 00			
	14	Thompson & Co.	500 00	Thompson & Co.		500 00			
	14	G. N. Thompson	512 00	Bills receivable and interest				512 00	
	16	H. T. Wagner	500 00	Bills receivable				500 00	
	17	Duxbury & Duxbury	398 50	Capital stock, 4 shares					398 50
	18	Thompson & Co. (Amundson)	700 00	Bills receivable				700 00	
	18	G. E. Cress	1,470 00	Bills receivable				1,470 00	
	20	Thompson & Co.	300 00	Thompson & Co.		300 00			
	21	Thompson & Co.	200 00	Thompson & Co.		200 00			
	25	Frank Larson (Olson)	80 00	Stocks and bonds				80 00	
	25	Thompson & Co.	500 00	Thompson & Co.		500 00			
	25	Thompson & Co.	400 00	Thompson & Co.		400 00			
	26	Thompson & Co.	50 00	Thompson & Co.		50 00			
	27	Thompson & Co.	300 00	Thompson & Co.		300 00			
	27	Thompson & Co.	1,200 00	Thompson & Co.		1,200 00			
Mar.	3	Geo. W. Huntley	5,000 00	Bills receivable				5,000 00	
	4	Thompson & Co.	100 00	Thompson & Co.		100 00			
	5	Thompson & Co.	950 00	Thompson & Co.		950 00			
	6	Thompson & Co.	200 00	Thompson & Co.		200 00			
	6	John Gallagher	1,258 75	Bills receivable				1,258 75	
	6	Jesie Amundson	410 00	Bills receivable and interest				410 00	
	9	Thompson & Co.	3,600 00	Thompson & Co.		3,600 00			
	9	Thompson & Co.	1,800 00	Thompson & Co.		1,800 00			

Date		Received From	Amount	Account Credited	Gross Income	From Phoenix Group	From S.S.H.Co. On Account	From Trustee Assets	From Other Assets
		March 10, 1931—Subtotal (Brought forward)	$245 992 70		$ 6,001 12	$174,609 00	$ 5,081 57	$ 59,902 51	$ 398 50
1931									
Mar	14	Thompson & Co.	1,000 00	Thompson & Co.		1,000 00			
	16	Thompson & Co.	100 00	Thompson & Co.		100 00			
	16	Harry Sparrow (Vegger)	247 00	Bills receivable				247 00	
	18	Rotland M. Wagner	5,150 00	Bills receivable and interest				5,150 00	
	18	Thompson & Co.	2,000 00	Thompson & Co.		2,000 00			
	20	Thompson & Co.	784 00	Thompson & Co.		784 00			
	21	Thompson & Co.	1,200 00	Thompson & Co.		1,200 00			
	21	Thompson & Co.	100 00	Thompson & Co.		100 00			
	13	H. T. Wagner	500 00	Bills receivable				500 00	
	31	A. G. Plankers (Part payment)	800 00	Bills receivable				800 00	
Apr	1	Thompson & Co.	500 00	Thompson & Co.		500 00			
	4	Wayne Johnston	764 00	Bills receivable				764 00	
	4	Thompson & Co.	425 00	Thompson & Co.		425 00			
	6	Thompson & Co.	100 00	Thompson & Co.		100 00			
	7	Thompson & Co.	692 50	Thompson & Co.		692 50			
	9	Thompson & Co.	1,200 00	Thompson & Co.		1,200 00			
	11	H. T. Wagner	500 00	Bills receivable				500 00	
	13	Thompson & Co.	399 87	Thompson & Co.		399 87			
	13	Thompson & Co.	2,100 00	Thompson & Co.		2,100 00			
	14	A. G. Plankers, M. D.	93 00	Bills receivable and interest				93 00	
	15	Thompson & Co.	513 50	Thompson & Co.		513 50			
	16	Thompson & Co.	50 50	Thompson & Co.		50 50			
	17	Thompson & Co.	200 00	Thompson & Co.		200 00			
	18	Thompson & Co.	5,864 01	Thompson & Co.		5,864 01			
	21	Thompson & Co.	200 00	Thompson & Co.		200 00			
	23	Thompson & Co.	1,000 00	Thompson & Co.		1,000 00			
	25	Thompson & Co.	800 00	Thompson & Co.		800 00			
	27	Thompson & Co.	700 00	Thompson & Co.		700 00			
	28	Thompson & Co.	336 25	Thompson & Co.		336 25			
	29	Thompson & Co.	2,840 00	Thompson & Co.		2,840 00			
	30	Thompson & Co.	200 00	Thompson & Co.		200 00			
	30	Frank H. Larson (Groth)	800 00	Stocks and bonds				800 00	
May	1	Thompson & Co.	850 00	Thompson & Co.		850 00			
	2	Thompson & Co.	100 00	Thompson & Co.		100 00			
	2	Thompson & Co.	400 00	Thompson & Co.		400 00			
	5	Thompson & Co.	100 00	Thompson & Co.		100 00			
	6	Sprague Bank (Krick)	63 50	C. D. and interest				63 50	
	6	Thompson & Co.	202 00	Thompson & Co.		202 00			
	8	Thompson & Co.	500 00(C)	Thompson & Co.		500 00			
	8	Thompson & Co.	400 00	Thompson & Co.		400 00			
	11	Thompson & Co.	900 00	Thompson & Co.		900 00			
	11	Thompson & Co.	7,500 00	Thompson & Co.		7,500 00			
	11	Thompson & Co.	100 00	Thompson & Co.		100 00			
	13	H. Halblen	250 00	Bills receivable				250 00	
	13	Harry Sparrow (Vegger)	99 50	Bills receivable				99 50	
	13	Thompson & Co.	200 00	Thompson & Co.		200 00			
		(Forward)	$289,817 33		$ 6,001 12	$209,166 63	$ 5,081 57	$ 69,169 51	$ 398 50

Cash Receipts (Cont'd)

ate	Received From	Amount	Account Credited	Gross Income	From Phoenix Group	From S.S.H.Co. On Account	From Trustee Assets	From Other Assets
	(Brought forward)	$289,817.33		$ 6,001 12	$209,166 63	$ 5,081 57	$ 69,169 51	$ 398 50
31								
14	H. T. Wagner	500 00	Bills receivable				500 00	
14	Thompson & Co.	500 00	Thompson & Co.		500 00			
14	Thompson & Co.	400 00	Thompson & Co.		400 00			
14	Thompson & Co.	500 00	Thompson & Co.		500 00			
15	Thompson & Co.	938 12	Thompson & Co.		938 12			
16	Thompson & Co.	261 40	Thompson & Co.		261 40			
16	Thompson & Co.	200 00	Thompson & Co.		200 00			
18	Thompson & Co.	2,000 00	Thompson & Co.		2,000 00			
15	Thompson & Co.	200 00	Thompson & Co.		200 00			
20	Thompson & Co.	50 75	Thompson & Co.		50 75			
21	Thompson & Co.	100 00	Thompson & Co.		100 00			
18	Thompson & Co.	400 00	Thompson & Co.		400 00			
21	Thompson & Co.	498 00	Thompson & Co.		498 00			
26	Thompson & Co.	6,677 00	Thompson & Co.		6,677 00			
26	Thompson & Co.	1,138 00	Thompson & Co.		1,138 00			
27	Thompson & Co.	195 00	Thompson & Co.		195 00			
1	Thompson & Co.	200 00	Thompson & Co.		200 00			
2	Thompson & Co.	100 00	Thompson & Co.		100 00			
3	Thompson & Co.	487 50	Thompson & Co.		487 50			
4	Thompson & Co.	200 00	Thompson & Co.		200 00			
5	R. R. Raggensack	75 00	Bills receivable				75 00	
5	Thompson & Co.	200 00	Thompson & Co.		200 00			
5	Thompson & Co.	170 00	Thompson & Co.		170 00			
5	Thompson & Co.	2,676 75(C)	Thompson & Co.		2,676 75			
6	Thompson & Co.	1,351 00	Thompson & Co.		1,351 00			
9	H. T. Wagner	500 00	Bills receivable				500 00	
10	Thompson & Co.	500 50	Thompson & Co.		500 50			
11	Thompson & Co.	1,200 00	Thompson & Co.		1,200 00			
12	Frank Larson (Groth)	800 00	Stocks and bonds				800 00	
12	Thompson & Co.	300 00	Thompson & Co.		300 00			
15	Thompson & Co.	400 00	Thompson & Co.		400 00			
15	Thompson & Co.	251 00	Thompson & Co.		251 00			
15	Thompson & Co.	1,000 00	Thompson & Co.		1,000 00			
15	Thompson & Co.	200 00	Thompson & Co.		200 00			
16	Thompson & Co.	200 00	Thompson & Co.		200 00			
17	Thompson & Co.	850 00	Thompson & Co.		850 00			
17	Thompson & Co.	1,005 70(C)	Thompson & Co.		1,005 70			
23	L. W. Williams	406 10	Misc. income (carnival)	406 10				
24	Thompson & Co.	200 00	Thompson & Co.		200 00			
25	Thompson & Co.	277 50	Thompson & Co.		277 50			
26	Thompson & Co.	200 00	Thompson & Co.		200 00			
27	Thompson & Co.	1,000 00	Thompson & Co.		1,000 00			
27	Thompson & Co.	200 00	Thompson & Co.		200 00			
30	Thompson & Co.	200 00	Thompson & Co.		200 00			
30	Thompson & Co.	1,000 00	Thompson & Co.		1,000 00			
30	Toll collections for June	5,344 31	Bridge income	5,344 31				
	(Forward)	$325,870 96		$ 11,751 53	$237,594 85	$ 5,081 57	$ 71,044 51	$ 398 50

Date		Received From	Amount	Account Credited	Gross Income	From Phoenix Group	From S.S.H.Co. On Account	From Trustee Assets	From Other Assets
		(Brought forward)	$325,870.96		$ 11,751.53	$237,594.85	$ 5,081.57	$ 71,044.51	$ 398.50
1931									
July	1	Thompson & Co.	400.00	Thompson & Co.		400.00			
	1	Thompson & Co.	1,800.00	Thompson & Co.		1,800.00			
	2	Thompson & Co.	500.00	Thompson & Co.		500.00			
	3	Thompson & Co.	2,000.00	Thompson & Co.		2,000.00			
	7	Thompson & Co.	2,000.00	Thompson & Co.		2,000.00			
	7	Thompson & Co.	100.00	Thompson & Co.		100.00			
	8	Thompson & Co.	1,087.50	Thompson & Co.		1,087.50			
	8	Thompson & Co.	300.00	Thompson & Co.		300.00			
	8	Thompson & Co.	1,200.00	Thompson & Co.		1,200.00			
	8	M. W. Typewriter Co.	2.80	Misc. expense	2.80				
	10	Thompson & Co.	2,000.00	Thompson & Co.		2,000.00			
	10	Thompson & Co.	101.00	Thompson & Co.		101.00			
	11	Tony Ahlstrom	5.00	Bills receivable				5.00	
	11	O. S. Bailey	2.50	Bills receivable				2.50	
	11	T. A. Bechter	2.50	Bills receivable				2.50	
	11	J. G. Minert	2.50	Bills receivable				2.50	
	11	E. J. Raggensack	2.50	Bills receivable				2.50	
	11	D. D. Raggensack	2.50	Bills receivable				2.50	
	11	D. A. Sheridan (A. E. Sheridan)	5.00	Bills receivable				5.00	
	11	J. W. Wendel	10.00	Bills receivable				10.00	
	11	Thompson & Co.	1,000.00	Thompson & Co.		1,000.00			
	11	Thompson & Co.	316.08	Thompson & Co.		316.08			
	11	Thompson & Co.	700.00	Thompson & Co.		700.00			
	11	Thompson & Co.	1,108.00	Thompson & Co.		1,108.00			
	13	Thompson & Co.	500.00	Thompson & Co.		500.00			
	14	Thompson & Co.	729.00	Thompson & Co.		729.00			
	14	Thompson & Co.	1,022.50	Thompson & Co.		1,022.50			
	15	Thompson & Co.	1,767.00	Thompson & Co.		1,767.00			
	17	Thompson & Co.	400.00	Thompson & Co.		400.00			
	17	Thompson & Co.	2,110.00	Thompson & Co.		2,110.00			
	17	Thompson & Co.	40.50	Thompson & Co.		40.50			
	18	Thompson & Co.	772.00	Thompson & Co.		772.00			
	18	Thompson & Co.	300.00	Thompson & Co.		300.00			
	18	Thompson & Co.	450.00	Thompson & Co.		450.00			
	18	L. C. Smith & Corona Type., Inc.	1.25	Misc. expense	1.25				
	18	Thompson & Co.	980.00	Thompson & Co.		980.00			
	18	Thompson & Co.	1,000.00	Thompson & Co.		1,000.00			
	20	H. T. Wagner	500.00	Bills receivable				500.00	
	20	Thompson & Co.	600.00	Thompson & Co.		600.00			
	21	Thompson & Co.	1,000.00	Thompson & Co.		1,000.00			
	21	Thompson & Co.	899.60	Thompson & Co.		899.60			
	22	Thompson & Co.	1,100.00	Thompson & Co.		1,100.00			
	22	D. F. Wolfe	15.00	Advertising and printing	15.00				
	23	Thompson & Co.	867.30	Thompson & Co.		867.30			
	24	Kernelt Bros.	66.10	Miscellaneous income	66.10				
	25	Thompson & Co.	450.00	Thompson & Co.		450.00			
	27	Thompson & Co.	58.50	Thompson & Co.		58.50			
	31	Toll collections for July	2,977.20	Bridge income	2,977.20				
Aug.	3	Thompson & Co.	2,000.00	Thompson & Co.		2,000.00			
	3	Thompson & Co.	1,629.50	Thompson & Co.		1,629.50			
	5	Thompson & Co.	261.25	Thompson & Co.		261.25			
	6	Toll collections to August 6, 1931	531.40	Bridge income	531.40				

[fol. 748] **Cash Receipts (Cont'd)**

Date		Received From	Amount	Account Credited	Gross Income	From Phoenix Group	From S.S.H.Co. On Account	From Trustee Assets	From Other Assets
		August 6, 1931—Subtotal (Brought forward)	$363,546 94		$ 15,345 28	$271,144 58	$ 5,081 57	$ 71,577 01	$ 398 50
1931									
Aug.	7	Thompson & Co.	1,421 00	Thompson & Co.		1,421 00			
	10	Thompson & Co.	400 00	Thompson & Co.		400 00			
	11	H. T. Wagner	500 00	Bills receivable				500 00	
	11	Thompson & Co.	30 00	Thompson & Co.		30 00			
	11	Thompson & Co.	120 52	Thompson & Co.		120 52			
	11	Thompson & Co.	1,079 00	Thompson & Co.		1,079 00			
	11	Thompson & Co.	500 00	Thompson & Co.		500 00			
	15	Thompson & Co.	918 75	Thompson & Co.		918 75			
	15	John Benson	15 25	P. & L.				15 25	
	18	Wesley Methodist Church (27 Groth)	14 80	Interest				14 80	
	22	Toll house cashier	92	Tel. & Tel.	92				
	22	Harry Sparrow (Vegger)	49 50	Bills receivable				49 50	
	22	Thompson & Co.	101 50	Thompson & Co.		101 50			
	28	Thompson & Co.	125 00	Thompson & Co.		125 00			
	31	Toll collections from August 6 to 31st	2,454 20	Bridge income	2,454 20				
	31	Maurice Rothschild Co.	05	Stationery and supplies	05				
Sept.	4	Thompson & Co.	50 00	Thompson & Co.		50 00			
	7	Thompson & Co.	4,750 00	Thompson & Co.		4,750 00			
	11	Thompson & Co.	400 00	Thompson & Co.		400 00			
	18	H. T. Wagner	500 00	Bills receivable				500 00	
	24	Harry Sparrow (Vegger)	117 00	Bills receivable and interest				117 00	
	24	Phoenix Finance System, Inc.	10,000 00			10,000 00			
	26	Thompson & Co.	305 50	Thompson & Co.		305 50			
	30	Toll collections for September	2,307 50	Bridge income ($15 00 to Petty cash)	2,307 50				
Oct.	8	Thompson & Co.	375 00	Thompson & Co.		375 00			
	9	Thompson & Co.	150 00			150 00			
	9	M. White	5 80	Tel. & Tel.	5 80				
	12	Thompson & Co.	100 00	Thompson & Co.		100 00			
	12	J. W. Wendel	50 00	Bills receivable				50 00	
	13	Thompson & Co.	570 00	Thompson & Co.		570 00			
	14	Thompson & Co.	150 00	Thompson & Co.		150 00			
	19	John Wendel	50 00	Bills receivable				50 00	
	22	Natchewey Drug Store	500 00	Bills receivable				500 00	
	22	Natchewey Drug Store	70	Stationery and supplies	70				
	22	Thompson & Co.	520 00	Thompson & Co.		520 00			
	31	Toll collections for October	2,680 60	Bridge income	2,680 60				
Nov.	11	Phoenix Finance System, Inc.	9,000 00			9,000 00			
	14	H. T. Wagner	500 00	Bills receivable				500 00	
	30	Toll collections for November	1,421 58	Bridge income	1,421 58				
	30	Alex Barrie	510 00	Notes receivable and P. & L.	10 00				500 00
		(Forward)	$406,295 11		$ 24,226 63	$302,210 85	$ 5,081 57	$ 73,873 56	$ 898 50

Date		Received From	Amount	Account Credited	Gross Income	From Phoenix Group	From S.S.H.Co. On Account	From Trustee Assets	From Other Assets
		(Brought forward)	$406,295 11		$ 24,226 63	$302,210 85	$ 5,081 57	$ 73,873 56	$ 898 50
1931									
Dec.	8	R. E. Ginder	25 00	P. & L. (Balance due on stock)	25 00				
	8	Oscar R. Thorson	1 58	Telephone and telegraph	1 58				
	24	Iowa Des Moines Nat'l Bank	10,112 71	Stocks and bonds (U. S. bonds)					10,112 71
	31	Toll collections for December	1,244 99	Bridge income	1,244 99				
1932									
Jan.	31	Toll collections for January	921 30	Bridge income	921 30				
	31	Oscar S. Risvold	13 50	Interest	13 50				
Feb.	27	Phoenix Finance Corp.	1,000 00	Phoenix Finance Corp.		1,000 00			
		Toll collections for February	729 40	Bridge income	729 40				
Mar.	31	Toll collections for March	434 00	Bridge income	434 00				
Apr	5	Phoenix Finance Corp.	8 00	Postage	8 00				
	25	Oscar S. Risvold	457 25	Notes receivable and interest	7 25				450 00
	30	Toll collections for April	707 05	Bridge income	707 05				
May	3	J. W. Wendel	468 49	Bills receivable and interest				468 49	
	10	O. R. Thorson	100 00	Salaries (refund)	100 00				
	19	Standard Oil Co.	45 50	Oil station rent	45 50				
	31	Toll collections for May	1,082 50	Bridge income	1,082 50				
June	4	Standard Oil Co.	35 00	Oil station rent	35 00				
	30	Oil and gas sales	138 93	Oil station income	138 93				
	30	Toll collections for June	982 63	Bridge income ($25 00 carried in cash)	982 63				
July	31	Oil and gas sales and rent	150 45	Oil station income and rent	150 45				
	31	Toll collections for July	1,275 10	Bridge income	1,275 10				
Aug	23	Interstate Power Co.	25	Miscellaneous expense	25				
	25	Mr. Kerndt	1 28	Telephone and telegraph	1 28				
	31	Oil and gas sales	128 04	Oil station income	128 04				
	31	Toll collection for August	1,372 10	Bridge income	1,372 10				
Sept	30	Oil and gas sales and rent	132 67	Oil station income and rent	132 67				
	30	Toll collections for September	1,256 70	Bridge income	1,256 70				
Oct	15	Standard Oil Co.	4 72	Oil station rent	4 72				
	21	Standard Oil Co.	1 72	Truck expense	1 72				
	31	Oil and gas sales	128 36	Oil station income	128 36				
	31	Toll collections for October	986 15	Bridge income	986 15				
Nov.	10	B. R. Dunn	41	Postage and taxes	41				
	10	Allen and Allen	45	Postage and taxes	45				
	28	Standard Oil Co.	1 58	Oil station rent	1 58				
	30	Oil and gas sales	124 20	Oil station income	124 20				
	30	Toll collections for November	717 10	Bridge income	717 10				
Dec	1	H. Ellington	6 33	Bills receivable (Dividend checks)				6 33	
	1	Anna O. Dahle	30 00	Bills receivable (Dividend checks)				30 00	
	1	Anna O. Dahle	6 40	Bills receivable (Dividend checks)				6 40	
	10	Standard Oil Co.	4 70	Oil station rent	4 70				
	15	Phoenix Finance Corp.	2,000 00	Notes payable		2,000 00			
	30	Marquette National Bank	30 18	Reserve				18 70	11 48
	31	Oil and gas sales	66 75	Oil station income ($4.75 in November cash)	66 75				
	31	Toll collections for December	577 44	Bridge income ($20.00 in November cash)	577 44				
		(Forward)	$433,802 03		$ 37,633 44	$305,210 85	$ 5,081 57	$ 74,403 48	$11,472 69

Cash Receipts (Cont'd)

Date		Received From	Amount	Account Credited	Gross Income	From Phoenix Group	From S.S.H.Co. On Account	From Trustee Assets	From Other Assets
		(Brought forward)	$433,802 03		$ 37,633 44	$305,210 85	$ 5,081 57	$ 74,403 48	$11,472 69
1933									
Jan.	16	Vance Thompson	.09	Miscellaneous expense	09				
	16	Standard Oil Co.	1 57	Oil station rent	1 57				
	20	Phoenix Finance Corp.	3,125 00	Notes payable		3,125 00			
	31	Oil and gas sales	98 80	Oil station income	98 80				
	31	Toll collections for January	563 80	Bridge income	563 80				
Feb.	7	Phoenix Finance Corp.	6,896 00	Phoenix Finance Corp.		6,896 00			
	10	Phoenix Finance Corp.	2,910 00	Phoenix Finance Corp.		2,910 00			
	20	Standard Oil Co.	3 15	Oil station rent	3 15				
	28	Oil and gas sales	65 55	Oil station income	65 55				
	28	Toll collections for February	524 35	Bridge income	524 35				
Mar.	25	Standard Oil Co.	2 10	Oil station rent	2 10				
	31	Oil and gas sales	60 35	Oil station income	60 35				
	31	Toll collections for March	522 04	Bridge income	522 04				
Apr.	11	Standard Oil Co.	2 03	Oil station rent	2 03				
	30	Oil and gas sales	75 00	Oil station income	75 00				
	30	Toll collections for April	683 10	Bridge income	683 10				
May	12	Standard Oil Co.	3 04	Oil station rent	3 04				
	19	Standard Oil Co.	65	Refund—gas purchase	65				
	19	Interstate Power Co.	30	Miscellaneous expense	30				
	31	Oil and gas sales	55 25	Oil station income	55 25				
	31	Toll collections for May	798 15	Bridge income	798 15				
June	12	Standard Oil Co.	2 28	Oil station rent	2 28				
	30	Oil and gas sales	86 75	Oil station income	86 75				
	30	Toll collections for June	950 10	Bridge income	950 10				
July	11	Standard Oil Co.	3 33	Oil station rent	3 33				
	31	Oil and gas sales	115 67	Oil station income	115 67				
	31	Toll collections for July	1,349 05	Bridge income	1,349 05				
Aug.	31	Toll collections for August	1,293 15	Bridge income	1,293 15				
Sept.	30	Toll collections for September	933 05	Bridge income	933 05				
	30	Oil and gas sales and rent	71 01	Oil station income and rent (in cash account)	71 01				
		Totals	$454,996 74		$ 45,897 15	$318,141 85	$ 5,081 57	$ 74,403 48	$11,472 69

Date		Paid To	Amount	Account Charged	To Phoenix Group	To Shaffer & Co. On Four Contracts	Other Construction Costs	To S. S. H. Co. on Account	Expenses, Furniture, Equipment, Etc.	To Stockholders
1930										
Nov.	4	John W. Shaffer & Co.	$ 2,000 00	(C) Engineering contractor		$ 2,000 00				
	5	N. W. National Bank, Escrow	7,700 00	Substructure contractor		7,700 00				
	5	A. J. Schunk, Postmaster	20 06	Postage					$ 20 06	
	7	John W. Shaffer & Co.	1,000 00	Superstructure contractor		1,000 00				
	12	John W. Shaffer & Co.	8,000 00	Superstructure contractor		8,000 00				
	12	Standard Shares Holding Co.	4,300 00	Standard Shares				$ 4,300 00		
	12	A. J. Schunk, Postmaster	10 03	Postage					10 03	
	14	A. G. Bey	14 13	Salaries and wages					14 13	
	14	A. M. Nystrom	5 07	Traveling and entertainment					5 07	
	15	Miss Olson	28 59	Salaries and wages					28 59	
	15	Selma Holmberg	45 00	Salaries and wages					45 00	
	15	John W. Shaffer & Co.	1,000 00	Superstructure contractor		1,000 00				
	15	T. F. McGinty	50 00	Salaries and wages					50 00	
	18	Standard Shares Holding Co.	500 00	Standard Shares				500 00		
	18	Homer L. Morrison, Surveyor	350 00	Right-of-way			$ 350 00			
	18	Thomas E. Gander	20 00	Right-of-way			20 00			
	18	A. M. Mystrom	6 00	Traveling expense					6 00	
	18	L. C. Smith & Corona Type., Inc.	3 00	Miscellaneous expense					3 00	
	18	Chippewa Springs	3 00	Miscellaneous expense					3 00	
	18	Andrews Hotel	43 70	Traveling expense					43 70	
	18	Ed. Stockland	6 00	Traveling expense					6 00	
				(Standard Shares				20 31		
	18	Imperial Printing Co.	27 96	(Stationery and supplies					6 75	
				(Advertising					90	
	18	Jacobson Fix. Exchange	106 35	(Furniture and fixtures					105 40	
				(Stationery and supplies					95	
	18	H. A. Rogers Co.	15 41	Advertising and printing					15 41	
	18	Poucher Printing & Litho.	2 10	Stationery and supplies					2 10	
	18	Eastman Kodak Co.	5 55	Advertising and printing					5 55	
	18	A. J. Schunk, Postmaster	50 03	Postage					50 03	
	18	Japs Olson Co.	9 90	Stationery and supplies					9 90	
	19	Western Union Telegraph Co.	14 76	Telephone and telegraph					14 76	
	19	Chippewa Springs Water Co.	4 00	Miscellaneous expense					4 00	
	19	Underwood Typewriter Co.	5 00	Miscellaneous expense					5 00	
	19	The LaCrosse Tribune Co.	75	Advertising					75	
	19	The Gazette Co.	2 50	Advertising					2 50	
	19	The Register & Tribune	5 70	Advertising					5 70	
	19	Corporation Service Co.	12 00	Stationery and supplies					12 00	
	19	Globe Office Furniture Co.	11 50	Furniture and fixtures					11 50	
	19	Imperial Printing Co.	33 05	Stationery and supplies					33 05	
	19	N. W. Bell Telephone Co.	74 15	Telephone and telegraph					74 15	
	19	Jacobson Furniture Co.	77 00	Furniture and fixtures					77 00	
	19	A. J. Schunk, Postmaster	20 06	Postage					20 06	
	19	Catherine Stoessel	5 75	Salaries and wages					5 75	
	19	John W. Shaffer & Co.	2,000 00	Substructure contractor		2,000 00				
	20	John W. Shaffer & Co.	1,000 00	Substructure contractor		1,000 00				
	21	Ruth Moss	7 50	Salaries and wages					7 50	
	24	John W. Shaffer & Co.	2,500 00	Grading contractor		2,500 00				
		(Forward)	$ 31,095 60		$ —0—	$ 25,200 00	$ 370 00	$ 4,820 31	$ 705 29	$ —0—

Date		Paid To	Amount	Account Charged	To Phoenix Group	To Shaffer & Co. On Four Contracts	Other Construction Costs	To S. S. H. Co. on Account	Expenses, Furniture, Equipment, Etc.	To Stockholders
[fol. 752]		(Brought forward)	$ 31,095 60		$ —0—	$ 25,230 00	$ 370 00	$ 4,820 31	$ 705 29	$ —0—
1930										
Nov.	25	A. M. Nystrom	15 09	Travel and entertainment					15 09	
	25	M. White	9 75	Travel and entertainment					9 75	
	25	J. A. Thompson	71 77	Travel and entertainment					71 77	
	25	A. J. Schunk, Postmaster	20 06	Advertising and printing					20 06	
	26	B. H. Wellendorf	19 60	Travel and entertainment					19 60	
	26	Aschom Bros.	5 40	Travel and entertainment					5 40	
	26	R. J. Gaunitz	10 60	Travel and entertainment					10 60	
	26	D. F. Wolfe	114 90	Travel and entertainment					114 90	
	26	John W. Shaffer & Co.	24,000 00	Substructure contractor		24,000 00				
	26	John W. Shaffer & Co. (C. of D.)	839 28(C)	Substructure contractor		839 28				
	28	Oscar R. Thorson	136 50	(Salaries and wages					90 00	
				(Travel and entertainment					46 50	
	28	Dividend checks	4,025 25	Dividends						4,025 25
Dec.	1	Marquette National Bank	4 50	Printing					4 50	
	1	Marquette National Bank	5 86	Miscellaneous expense					5 86	
	1	A. J. Schunk, Postmaster	40 12	Postage					40 12	
	1	Selma Holmberg	50 00	Salaries and wages					50 00	
	1	L. F. McGinty	55 00	Salaries and wages					55 00	
	1	Phoenix Leasehold, Inc.	96 91	Rent, light and heat					96 91	
	1	Ed. Stockland	38 06	Travel and entertainment					38 00	
	2	Nicollet Hotel, Minneapolis	125 87	Travel and entertainment					125 87	
	4	R. A. and M. A. Dunlevy	1,000 00	Right-of-way			1,000 00			
	4	Witts Market House	43 79	Travel and entertainment					43 79	
	4	Minneapolis Blue Print Co.	3 92	Printing					3 92	
	4	Globe Office Furniture Co.	43 00	Furniture and fixtures					43 00	
	4	Andrews Hotel	116 30	Travel and entertainment					116 30	
	4	Corp. Trust Co.	6 00	Stationery and supplies					6 00	
	4	Bilz Sign Co.	78 00	Advertising and printing					78 00	
	5	Marquette National Bank	2 35	Miscellaneous expense					2 35	
	6	Marquette National Bank	48	Licenses, taxes and fees					48	
	8	The Kimm Company	15 64	Advertising and printing					15 64	
	10	N. W. Bell Telephone Co.	112 20	Telephone and telegraph					112 20	
	10	T. J. Schultz	2 06	Dividend						2 06
	15	Treasurer—State of Minnesota	50 00	Licenses, taxes and fees					50 00	
	15	Selma Holmberg	50 00	Salaries and wages					50 00	
	15	L. F. McGinty	55 00	Salaries and wages					55 00	
	15	Oscar R. Thorson	150 00	Salaries and wages					150 00	
	15	Marion Fiege	63 00	Salaries and wages					63 00	
	15	Secretary of State—Minnesota	2 00	Travel and Entertainment					2 00	
	15	A. J. Schunk, Postmaster	3 00	Postage					3 00	
	18	Collector of Internal Revenue	189 75	Licenses, taxes and fees					189 75	
	22	Chippewa Springs Corp.	3 50	Miscellaneous expense					3 50	
	22	L. C. Smith Type. Co.	3 00	Miscellaneous expense					3 00	
	22	Underwood Type. Co.	5 00	Miscellaneous expense					5 00	
	22	Miller Davis Co.	4 25	Stationery and supplies					4 25	
	22	Japs Olson Co.	32 55	Stationery and supplies					32 55	
	22	Hoff Rubber Stamp Co.	8 35	Stationery and supplies					8 35	
	22	McClain Company	33 00	Stationery and supplies					33 00	
	22	Farnham Printing Co.	41 23	Stationery and supplies					41 23	
	22	Universal Circular Letter Co.	18 77	Advertising and printing					18 77	
	22	Maynard Stohr Co.	1 75	Stationery and supplies					1 75	
		(Forward)	$ 62,917 95		$ —0—	$ 50,039 28	$ 1,370 00	$ 820 31	$ 2,661 05	$ 4,027 31

Date		Paid To	Amount	Account Charged	To Phoenix Group	To Shaffer & Co. On Four Contracts	Other Construction Costs	To S. S. H. Co. on Account	Expenses, Furniture, Equipment, Etc.	To Stockholders
		(Brought forward)	$ 62,917 95		$ —0—	$ 50,039 28	$1,370 00	$ 4,820 31	$ 2,661 05	$ 4,027 31
1930										
Dec.	22	Norton & Peel	18 70	Advertising and printing					18 70	
	22	Chicago Journal of Commerce	1 25	Advertising and printing					1 25	
	22	Eastman Kodak Stores	15 97	Advertising and printing					15 97	
	22	Dahms Photo Print Co.	152 81	Advertising and printing					152 81	
	22	Allamakee Journal	74 25	Advertising and printing					74 25	
	22	Imperial Printing Co.	62 85	Advertising and printing					62 85	
	23	Thompson & Co.	10,000 00	Thompson & Co.	10,000 00					
	23	Oscar R. Thorson	52 01	Travel and entertainment					52 01	
	24	Thompson & Co.	13,000 00	Thompson & Co.	13,000 00					
	24	A. J. Schunk, Postmaster	20 06	Postage					20 06	
	30	John W. Shaffer & Co.	2,500 00	Grading contractor		2,500 00				
	30	Western Union Telegraph Co.	4 37	Telephone and telegraph					4 37	
	31	Phoenix Leasehold, Inc.	84 00	Rent, light and heat					84 00	
	31	Oscar R. Thorson	150 00	Salaries and wages					150 00	
	31	L. F. McGinty	55 00	Salaries and wages					55 00	
	31	Selma Holmberg	50 00	Salaries and wages					50 00	
	31	Muriel Johnston	39 09	Salaries and wages					39 09	
	31	John W. Shaffer & Co.	4,000 00	Substructure contractor		4,000 00				
	31	Thompson & Co.	16,870 00	Thompson & Co.	16,870 00					
1931										
Jan.	2	Marquette National Bank	11 75	Licenses, taxes and fees					11 75	
	2	N. W. Bell Telephone Co.	90 30	Telephone and telegraph					90 30	
	3	Secretary of State — Delaware	2 00	Licenses, taxes and fees					2 00	
	5	J. W. Dempsey	48 10	Telephone and telegraph					6 75	
				Licenses, taxes and fees					90	
				Travel and entertainment					40 45	
	6	Carl Wheeler	15 00	Advertising and printing					15 00	
	7	Collector of Internal Revenue	93 97	Licenses, taxes and fees					93 97	
	8	John W. Shaffer & Co.	500 00	Engineering contractor		500 00				
	9	Marquette Trust Co.	20,918 37	Thompson & Co.	20,918 37					
	2	Thompson & Co.	1,500 00	Thompson & Co.	1,5000 00					
	9	Peoples State Bank	3,000 00	Thompson & Co.	3,000 00					
	12	Thompson & Co.	4,000 00	Thompson & Co.	4,000 00					
	12	Thompson & Co.	5,000 00	Thompson & Co.	5,000 00					
	12	Dahms Photo Print Co.	21 67	Advertising and printing					21 67	
	12	Corporation Trust Co.	32 50	Licenses, taxes and fees					32 50	
	13	Wm. Krick	2 08	Licenses, taxes and fees					2 08	
	14	Hoff Ruber Stamp Co.	1 70	Stationery and Supplies					1 70	
	14	H. A. Rogers Co.	10 25	Advertising and printing					10 25	
	14	L. C. Smith & Corona Type., Inc.	3 00	Miscellaneous expense					3 00	
	14	Waterloo Daily Courier	75	Advertising and printing					75	
	14	Eastman Kodak Stores, Inc.	3 90	Advertising and printing					3 90	
	14	Oyen Adv. Sign Co.	16 23	Advertising and printing					16 23	
	14	Phoenix Leasehold, Inc.	10 35	Rent, light and heat					10 35	
	14	Farnham Printing & Stationery Co.	17 30	Stationery and supplies					17 30	
	14	Jacobson Fixture Exchange	185 00	Furniture and fixtures					185 00	
	14	Imperial Printing Co.	9 00	Stationery and supplies					9 00	
	14	Minneapolis Blue Printing Co.	5 15	Advertising and printing					5 15	
	14	Chippewa Springs Corp.	7 00	Miscellaneous expense					7 00	
		(Forward)	$145,573 59		$ 74,288 37	$ 57,039 28	$ 1,370 00	$ 4,820 31	$ 4,028 32	$ 4,027 31

Date		Paid To	Amount	Account Charged	To Phoenix Group	To Shaffer & Co. On Four Contracts	Other Construction Costs	To S. S. H. Co. on Account	Expenses, Furniture, Equipment, Etc.	To Stockholders
[fol. 754]		(Brought forward)	$145,573 59		$ 71,288 37	$ 57,039 28	$ 1,370 00	$ 4,820 31	$ 4,028 32	$ 4,027 31
1936										
Jan.	14	Western Union Telegraph Co.	1 84	Advertising and printing					1 84	
	14	Universal Circular Letter Co.	15 53	Advertising and printing					15 53	
	15	Oscar Thorson	150 00	Salaries and wages					150 00	
	15	L. F. McGinty	55 00	Salaries and wages					55 00	
	15	Selma Holmberg	50 00	Salaries and wages					50 00	
	15	Muriel Johnston	45 00	Salaries and wages					45 00	
	15	Thompson & Co.	3,000 00	Thompson & Co.	3,000 00					
	15	The Register & Tribune	1 25	Advertising and printing					1 25	
	19	Thompson & Co.	2,500 00	Thompson & Co.	2,500 00					
	22	Thompson & Co.	3,000 00	Thompson & Co.	3,000 00					
	19	A. J. Schunk, Postmaster	20 06	Postage					20 06	
	24	Thompson & Co.	3,000 00	Thompson & Co.	3,000 00					
	24	Thompson & Co.	1,000 00	Thompson & Co.	1,000 00					
	26	Dahms Photo Print Co.	54 40	Advertising and printing					54 40	
	29	Thompson & Co.	900 00	Thompson & Co.	900.00					
	31	Marquette National Bank	5 45	Licenses, taxes and fees					5 45	
	31	John W. Shaffer & Co.	1,616 27	Approaches			1,616 27			
	31	Oscar R. Thorson	150 00	Salaries and wages					150 00	
	31	Selma Holmberg	50 00	Salaries and wages					50 00	
	31	Muriel Johnston	45 00	Salaries and wages					45 00	
	31	Phoenix Leasehold, Inc.	84 00	Rent, light and heat					84 00	
	31	S. S. H. Co. for Eastman Recission	300.00	Stocks and bonds						300 00
Feb.	2	Phoenix Leasehold, Inc.	6 40	Rent, light and heat					6 40	
	2	Carl Wheeler	20 00	Advertising and printing					20 00	
	9	Thompson & Co.	2,618 56	Thompson & Co.	2,618 56					
	10	Thompson & Co.	7,000 00	Thompson & Co.	7,000 00					
	11	Universal Circular Letter Co.	3 25	Advertising and printing					3 25	
	11	The Andrews Hotel	28 65	Travel and entertainment					28 65	
	11	E. E. Peterson Sign Co.	1 50	Advertising and printing					1 50	
	11	Shaw-Walker	45 90	Furniture and fixtures					45 90	
	11	Chippewa Springs Corp.	4 50	Miscellaneous expense					4 50	
	11	Norton & Peel	7 54	Advertising and printing					7 54	
	11	Eastman Kodak Stores	52 36	Advertising and printing					52 36	
	11	L. C. Smith & Corona Type., Inc.	3 00	Miscellaneous expense					3 00	
	11	Frederick McDowell	2 25	Advertising and printing					2 25	
	11	Bureau of Engraving	50 60	Advertising and printing					50 60	
	11	H. A. Rogers Company	31 15	Advertising and printing					31 15	
	11	N. W. Bell Telephone Co.	88 05	Telephone and telegraph					88 05	
	11	Allamakee Journal	76 20	Advertising and printing					76 20	
	11	Dahms Photo Print Co.	10 04	Advertising and printing					10 04	
	11	Oscar R. Thorson	63 09	Travel and entertainment					63 00	
	11	A. R. Maul Co.	55 00	Advertising and printing					55 00	
	11	Decorah Public Opinion	1 75	Advertising and printing					1 75	
	11	Postal Telegraph & Cable Co.	1 32	Telephone and telegraph					1 32	
	11	Western Union Telegraph Co.	5 01	Telephone and telegraph					5 01	
	14	Oscar R. Thorson	150 00	Salaries and wages					150 00	
	14	Selma Holmberg	50 00	Salaries and wages					50 00	
	14	Muriel Johnston	45 00	Salaries and wages					45 00	
	14	E. C. Stockland	50 00	Travel and entertainment					50 00	
	16	A. M. Nystrom	18.03	Travel and entertainment					18.03	
		(Forward)	$172,106 45		$ 97,306 93	$ 57,039 28	$ 2,936 27	$ 4,820 31	$ 5,626 35	$ 4,327 31

Date		Paid To	Amount	Account Charged	To Phoenix Group	To Shaffer & Co. On Four Contracts	Other Construction Costs	To S. S. H. Co. on Account	Expenses, Furniture, Equipment, Etc.	To Stockholders
[fol. 755] 1931		(Brought forward)	$172,106 45		$ 97,306 93	$ 57,039 28	$ 2,986 27	$ 4,820 31	$ 5,626 35	$ 4,327 31
Feb.	16	The LaCrosse Tribune Co.	1 00	Advertising and printing					1 00	
	16	E. C. Stockland	12 60	Travel and entertainment					12 60	
	18	Thompson & Co.	2,560 00	Stocks and bonds						2,560 00
	19	N. W. Typewriter Exchange	7 00	Miscellaneous expense					7 00	
	20	Thompson & Co.	1,000 00	Thompson & Co.	1,000 00					
	23	John W. Shaffer & Co.	342 19	Approaches			342 19			
	23	John W. Shaffer & Co.	178 80	Approaches			178 80			
	23	The LaCrosse Tribune Co.	60	Advertising and printing					60	
	23	N. W. Bell Telephone Co.	67 20	Telephone and telegraph					67 20	
	23	A. N. Nystrom	25 47	Travel and entertainment					25 47	
	24	A. J. Schunk, Postmaster	25 06	Postage					25 06	
	24	H. A. Rogers Co.	7 55	Advertising and printing					7 55	
	24	Thompson & Co.	1,000 00	Thompson & Co.	1,000 00					
	26	Thompson & Co.	1,000 00	Thompson & Co.	1,000 00					
	20	Thompson & Co.	500 00	Thompson & Co.	500 00					
	28	Marquette National Bank	10 28	Licenses, taxes and fees					10 28	
	28	Oscar R. Thorson	150 00	Salaries and wages					150 00	
	28	Selma Holmberg	50 00	Salaries and wages					50 00	
	28	Muriel Johnston	45 00	Salaries and wages					45 00	
	28	Phoenix Leasehold, Inc.	84 00	Rent, light and heat					84 00	
	28	The Sioux City Journal	1 50	Advertising and printing					1 50	
	28	The Osage News	1 25	Advertising and printing					1 25	
	28	The Democrat	1 00	Advertising and printing					1 00	
Mar.	2	A. M. Nystrom	16 83	Travel and entertainment					16 83	
	3	Thompson & Co.	1,200 00	Thompson & Co.	1,200 00					
	4	New England Furniture & Carpet	50 00	Furniture and fixtures					50 00	
	4	Thompson & Co.	4,000 00	Thompson & Co.	4,000 00					
	4	Standard Shares Holding Co.	1,000 00	Standard Shares Holding Co.				1,000 00		
	6	Thompson & Co.	1,000 00	Thompson & Co.	1,000 00					
	9	A. M. Nystrom	27 40	Travel and entertainment					27 40	
		March 9, 1931—Subtotal	$186,471 18		$107,006 92	$ 57,039 28	$ 3,507 26	$ 5,820 31	$ 6,210 09	$ 6,887 31
Mar.	10	W. H. Schofield	$ 1,000 00	Notes receivable						$ 1,000 00
	10	Cash	50,000 00(C)	(Substructure contractor		$ 25,000 00				
				(Grading contractor		5,000 00				
				(Engineering contractor		5,000 00				
				(Thompson & Co.	$ 15,000 00					
		Mar 10, 1931 — Subtotal	$237,471 18		$122,006 93	$ 92,039 28	$ 3,507 26	$ 5,820 31	$ 6,210 09	$ 7,887 31
Mar.	11	J. A. Thompson	$ 186 10	Travel and entertainment					$ 186 10	
	11	V. W. O'Connor	150 10	Travel and entertainment					150 10	
	11	John W. Shaffer & Co.	1,000 00	Approaches			$ 1,000 00			
	11	John W. Shaffer & Co.	1,900 00	Approaches			1,000 00			
	11	Nicholas Wagner	400 00	Right-of-way			400 00			
	13	Julius Boeckle	3 00	Travel and entertainment					3 00	
	12	Phoenix Leasehold, Inc.	2 99	Rent, light and heat					2 99	
	14	Oscar R. Thorson	150 00	Salaries and wages					150 00	
	14	Selma Holmberg	50 00	Salaries and wages					50 00	
	14	Muriel Johnston	45 00	Salaries and wages					45 00	
		(Forward)	$240,458 37		$122,006 93	$ 92,039 28	$ 5,907 26	$ 5,820 31	$ 6,797 28	$ 7,887 31

Date		Paid To	Amount	Account Charged	To Phoenix Group	To Shaffer & Co. On Four Contracts	Other Construction Costs	To S. S. H. Co. on Account	Expenses, Furniture, Equipment, Etc.	To Stockholders
		(Brought forward)	$240,458 37		$122,006 93	$ 92,039 28	$ 5,997 26	$ 5,820 31	$ 6,797.28	$ 7,887.31
1931										
Mar.	16	Eastman Kodak Stores, Inc.	9 00	Advertising and printing					9.00	
	16	Bureau of Engraving, Inc.	32 98	Advertising and printing					32.98	
	16	Underwood Typewriter Co.	7 00	Miscellaneous expense					7.00	
	16	Farnham Printing & Staty. Co.	9 55	Stationery and Supplies					9.55	
	16	Western Union Telegraph Co.	5 30	Telephone and telegraph					5.30	
	16	Imperial Printing Co.	62 65	Advertising and printing					62.65	
	16	Norton & Peel	4 20	Advertising and printing					4.20	
	16	Universal Circular Letter Co.	4 88	Advertising and printing					4.88	
	16	Chippewa Springs Corp.	7 00	Miscellaneous expense					7.00	
	16	L. C. Smith & Corona Type., Inc.	3 00	Miscellaneous expense					3.00	
	16	A. M. Nystrom	19 24	Travel and entertainment					19.24	
	16	The Osage News	1 25	Advertising and printing					1.25	
	16	Decorah Public Opinion	1 25	Advertising and printing					1.25	
	16	The Howard County Times	5 25	Advertising and printing					5.25	
	17	Thompson & Co.	4,000 00	Thompson & Co.	4,000 00					
	18	Standard Shares Holding Co.	804 50	Standard Shares Holding Co.				804.50		
	19	Thompson & Co.	1,500 00	Thompson & Co.	1,500 00					
	20	Thompson & Co.	1,000 00	Thompson & Co.	1,000 00					
	20	A. J. Schunk, Postmaster	28 06	Postage					28.06	
	20	John W. Shaffer & Co.	101 00	Right-of-way			101 00			
	21	Thompson & Co.	4,000 00	Thompson & Co.	4,000 00					
	21	Selma Holmberg	50 00	Salaries and wages					50.00	
	23	A. M. Nystrom	17 77	Travel and entertainment					17.77	
	25	Oscar R. Thorson	19 95	Travel and entertainment					19.95	
	28	John W. Shaffer & Co.	144 41	Approaches			144.41			
	30	Thompson & Co.	2,000 00	Thompson & Co.	2,000 00					
	30	Chicago Ave. Greenhouses	12 50	Miscellaneous expense					12.50	
	30	Peoples State Bank of Lansing	29 11	Licenses, taxes and fees					29.11	
	30	Secretary of State—Wisconsin	2 00	Licenses, taxes and fees					2.00	
	30	A. M. Nystrom	29 11	Travel and entertainment					29.11	
	31	Oscar R. Thorson	150 00	Salaries and wages					150.00	
	31	Muriel Johnston	50 00	Salaries and wages					50.00	
	31	Phoenix Leasehold, Inc.	84 00	Rent, light and heat					84.00	
	31	Marquette National Bank	6 78	Licenses, taxes and fees					6.78	
Apr.	1	N. W. Bell Telephone Co.	53 05	Telephone and telegraph					53.05	
	1	A. J. Schunk, Postmaster	50 15	Postage					50.15	
	2	Selma Holmberg	3 00	Salaries and wages					3.00	
	3	Thompson & Co.	400 00	Thompson & Co.	400 00					
	3	John W. Shaffer & Co.	500 00	Approaches			500 00			
	7	Standard Shares Holding Co.	1,000 00	Standard Shares Holding Co.				1,000 00		
	7	John W. Shaffer & Co.	1,000 00	Approaches			1,000 00			
	7	Corporation Trust Co.	50 00	Licenses, taxes and fees					50.00	
	10	Vernon W. O'Connor	100 00	Right-of-way			100 00			
	10	Thompson & Co	1,500 00	Thompson & Co.	1,500 00					
	11	John W. Shaffer & Co.	500 00	Approaches			500 00			
	13	Oscar R. Thorson	150 00	Salaries and wages					150.00	
	14	Moen Photo Service	2 65	Advertising and printing					2.65	
	14	Farnham Prtg. & Staty. Co.	10 64	Stationery and supplies					10.64	
	14	Imperial Printing Co.	74 85	(Stationery and supplies (Advertising and printing					1.10 73.75	
	14	Bureau of Engraving, Inc.	17 29	Advertising and printing					17.29	
		(Forward)	$260,071 74		$136,406 93	$ 92,039 28	$ 8,252 67	$ 7,624 81	$ 7,860.74	$ 7,887 31

Cash Disbursements (Cont'd)

Date		Paid To	Amount	Account Charged	To Phoenix Group	To Shaffer & Co. On Four Contracts	Other Construction Costs	To S. S. H. Co. on Account	Expenses, Furniture, Equipment, Etc.	To Stockholders
		(Brought forward)	$260,071 74		$136,406 93	$ 92,039 28	$ 8,252 67	$ 7,624 81	$ 7,860.74	$ 7,887.31
1931										
Apr.	14	Eastman Kodak Stores, Inc.	1 68	Advertising and printing					1 68	
	14	L. C. Smith & Corona Type., Inc.	3 00	Miscellaneous expense					3 00	
	14	Norton & Peel	1 60	Advertising and printing					1 60	
	14	Chippewa Springs Corp.	4 00	Miscellaneous expense					4 00	
	14	Maynard Stohr Printing Co.	4 35	Advertising and printing					4 35	
	14	Pitman Barnes Printing Co.	2 40	Advertising and printing					2 40	
	14	The Osage News	1 25	Advertising and printing					1 25	
	14	The Democrat	1 00	Advertising and printing					1 00	
	14	Allamakee Journal	86 70	Advertising and printing					86 70	
	14	Universal Circular Letter Co.	5 67	Advertising and printing					5 67	
	14	Phoenix Leasehold, Inc.	2 62	Rent, light and heat					2 62	
	14	Postal Telegraph & Cable Co.	1 73	Telephone and telegraph					1 73	
	14	Fayette D. Kendrick	154 38	Thompson & Co.	154 38					
	15	Muriel Johnston	50 00	Salaries and wages					50 00	
	16	Thompson & Co.	2,000 00	Thompson & Co.	2,000 00					
	18	Thompson & Co.	1,500 00	Thompson & Co.	1,500 00					
	18	Thomas E. Gander	34 50	Licenses, taxes and fees					34 50	
	20	Thompson & Co.	3,774 72	Thompson & Co.	3,774 72					
	20	H. A. Rogers Co.	3 60	Advertising and Printing					3 60	
	21	Natchtenup Drug Store	8 70	Advertising and printing					8 70	
	22	A. M. Nystrom	45 07	Travel and entertainment					45 07	
	22	John W. Shaffer & Co.	2,006 69	Approaches			2,006 69			
	22	Oscar R. Thorson	50 75	Travel and entertainment					50 75	
	22	John W. Shaffer & Co.	264 00	Approaches			264 00			
	22	John W. Shaffer & Co.	500 00	Approaches			500 00			
	24	Thompson & Co.	400 15	Thompson & Co.	400 15					
	25	Western Union Telegraph Co.	1 86	Telephone and telegraph					1 86	
	27	A. J. Schunk, Postmaster	16 03	Postage					16 03	
	30	Oscar R. Thorson	150 00	Salaries and wages					150 00	
	30	Muriel Johnston	50 00	Salaries and wages					50 00	
	30	M. White	27 95	Travel and entertainment					27 95	
	30	Thompson & Co.	4,500 00	Thompson & Co.	4,500 00					
	30	Phoenix Leasehold, Inc.	86 29	Rent, light and heat					86 29	
	30	Marquette National Bank	3 95	Licenses, taxes and fees					3 95	

1931									
Apr.	14	Eastman Kodak Stores, Inc.	1.68	Advertising and printing					1.68
	14	L. C. Smith & Corona Type., Inc	3.00	Miscellaneous expense					3.00
	14	Norton & Peel	1.60	Advertising and printing					1.60
	14	Chippewa Springs Corp.	4.00	Miscellaneous expense					4.00
	14	Maynard Stohr Printing Co.	4.35	Advertising and printing					4.35
	14	Pitman Barnes Printing Co.	2.40	Advertising and printing					2.40
	14	The Osage News	1.25	Advertising and printing					1.25
	14	The Democrat	1.00	Advertising and printing					1.00
	14	Allamakee Journal	86.70	Advertising and printing					86.70
	14	Universal Circular Letter Co.	5.67	Advertising and printing					5.67
	14	Phoenix Leasehold, Inc.	2.62	Rent, light and heat					2.62
	14	Postal Telegraph & Cable Co.	1.73	Telephone and telegraph					1.73
	14	Fayette D. Kendrick	154.38	Thompson & Co.	154.38				
	15	Muriel Johnston	50.00	Salaries and wages					50.00
	16	Thompson & Co.	2,000.00	Thompson & Co.	2,000.00				
	18	Thompson & Co.	1,500.00	Thompson & Co.	1,500.00				
	18	Thomas E. Gander	34.50	Licenses, taxes and fees					34.50
	20	Thompson & Co.	3,774.72	Thompson & Co.	3,774.72				
	20	H. A. Rogers Co.	3.60	Advertising and Printing					3.60
	21	Natchtenup Drug Store	8.70	Advertising and printing					8.70
	22	A. M. Nystrom	45.07	Travel and entertainment					45.07
	22	John W. Shaffer & Co.	2,006.69	Approaches			2,006.69		
	22	Oscar R. Thorson	50.75	Travel and entertainment					50.75
	22	John W. Shaffer & Co.	264.00	Approaches			264.00		
	22	John W. Shaffer & Co.	500.00	Approaches			500.00		
	24	Thompson & Co.	400.15	Thompson & Co.	400.15				
	25	Western Union Telegraph Co.	1.86	Telephone and telegraph					1.86
	27	A. J. Schunk, Postmaster	16.03	Postage					16.03
	30	Oscar R. Thorson	150.00	Salaries and wages					150.00
	30	Muriel Johnston	50.00	Salaries and wages					50.00
	30	M. White	27.95	Travel and entertainment					27.95
	30	Thompson & Co.	4,500.00	Thompson & Co.	4,500.00				
	30	Phoenix Leasehold, Inc.	86.29	Rent, light and heat					86.29
	30	Marquette National Bank	3.95	Licenses, taxes and fees					3.95
May	1	N. W. Bell Telephone Co.	49.60	Telephone and telegraph					49.60
	1	Chicago Journal of Commerce	3.75	Licenses, taxes and fees					3.75
	1	The Lind Studio	145.75	Advertising and printing					145.75
	1	The Jewell Record	.25	Advertising and printing					.25
	2	Thompson & Co.	1,000.00	Thompson & Co.	1,000.00				
	2	E. D. Wilcox	15.84	Travel and entertainment					15.84
	4	Thompson & Co.	1,000.00	Thompson & Co.	1,000.00				
	8	A. J. Schunk, Postmaster	7.00	Postage					7.00
	8	Collector of Internal Revenue	8.00	Postage					8.00
	8	John W. Shaffner & Co.	500.00(C)	Approaches			500.00		
	8	John W. Shaffer & Co.	500.00	Approaches			500.00		
	9	A. M. Nystrom	46.16	Travel and entertainment					46.16
	4	E. C. Stockland	50.00	Travel and entertainment					50.00
	12	John W. Shaffer & Co.	1,181.09	Approaches			1,181.09		
	12	John W. Shaffer & Co.	1,000.00	Grading contractor		1,000.00			
	12	Thompson & Co.	5,000.00	Thompson & Co.	5,000.00				
	13	E. D. Wilcox	10.83	Travel and entertainment					10.83
	15	Oscar R. Thorson	150.00	Salaries and wages					150.00
	15	Muriel Johnston	50.00	Salaries and wages					50.00
	15	Perry E. Crosier	4.00	Licenses, taxes and fees					4.00
		(Forward)	$286,538.65		$155,736.18	$ 93,039.28	$ 13,204.45	$ 7,624.81	$ 9,046.92	$ 7,887.31

Date		Paid To	Amount	Account Charged	To Phoenix Group	To Shaffer & Co. On Four Contracts	Other Construction Costs	To S. S. H. Co. on Account	Expenses, Furniture, Equipment, Etc.	To Stockholders
		(Brought forward)	$286,538.65		$155,736.18	$ 93,039.28	$ 13,204.45	$ 7,624.81	$ 9,046.62	$ 7,887.31
1931										
May	15	Imperial Printing Co.	129.50	Advertising and printing					129.50	
	15	Farnham Prtg. and Staty. Co.	1.40	Stationery and supplies					1.40	
	15	Bureau of Engraving	15.19	Advertising and printing					15.19	
	15	Fish Sign Service	100.00	Advertising and printing					100.00	
	15	E. J. Heigarel Co.	10.35	Advertising and printing					10.35	
	15	Chippewa Springs Corp.	4.00	Miscellaneous expense					4.00	
	15	The Corporation Trust Co.	56.07	Licenses, taxes and fees					56.07	
	15	N. W. Typewriter Exchange	7.00	Miscellaneous expense					7.00	
	15	Postal T[illegible]aph & Cable Co.	7.46	Telephone and telegraph					7.46	
	15	Cobb, Hoag, Bensen, Krause & Faeger	525.00	Licenses, taxes and fees					525.00	
	15	Universal Circular Letter Co.	47.16	Advertising and printing					47.16	
	15	Oscar R. Thorson	6.00	Travel and entertainment					6.00	
	16	L. C. Smith & Corona Type., Inc.	7.50	Miscellaneous expense					7.50	
	16	Norton & Peel	1.50	Advertisement and printing					1.50	
	16	Western Union Telegraph Co.	1.83	Telephone and telegraph					1.83	
	16	Corporation Trust Co.	50.00	Licenses, taxes and fees					50.00	
	16	J. W. Dempsey	300.00	Licenses, taxes and fees					300.00	
	18	Thompson & Co.	1,700.00	Thompson & Co.	1,700.00					
	18	A. M. Nystrom	61.91	Travel and entertainment					61.91	
	18	E. C. Stockland	58.30	Travel and entertainment					58.30	
	18	Thompson & Co.	1,400.00	Thompson & Co.	1,400.00					
	18	Thompson & Co.	200.00	Thompson & Co.	200.00					
	18	Thompson & Co.	500.00	Thompson & Co.	500.00					
	20	Thompson & Co.	1,000.00	Thompson & Co.	1,000.00					
	22	John W. Shaffer & Co.	1,321.56	Approaches			1,321.56			
	23	E. C. Stockland	64.85	Travel and entertainment					65.85	
	25	E. C. Stockland	50.00	Travel and entertainment					50.00	
	25	Oscar R. Thorson	15.45	Travel and entertainment					15.45	
	27	A. J. Schunk, Postmaster	16.03	Postage					16.03	
	28	Thompson & Co.	7,500.00	Thompson & Co.	7,500.00					
	28	Oscar R. Thorson	17.40	Travel and entertainment					17.40	
	28	E. C. Stockland	6.45	Travel and entertainment					6.45	
	29	Oscar R. Thorson	150.00	Salaries and wages					150.00	
	29	Muriel Johnston	50.00	Salaries and wages					50.00	
	29	Phoenix Leasehold, Inc.	84.00	Rent, light and heat					84.00	
	29	N. W. Bell Telephone Co.	59.35	Telephone and telegraph					59.35	
	29	Thompson & Co.	677.53	Thompson & Co.	677.53					
	29	Thompson & Co.	1,300.00	Thompson & Co.	1,300.00					
	29	Thompson & Co.	200.00	Thompson & Co.	200.00					
	29	Marquette National Bank	5.17	Licenses, taxes and fees					5.17	
June	1	E. C. Stockland	50.00	Travel and entertainment					50.00	
	5	J. H. Harmon	100.00	Thompson & Co.	100.00					
	5	J. H. Harmon	50.00	Thompson & Co.	50.00					
	5	E. D. Burgin	100.00	Thompson & Co.	100.00					
	5	E. D. Burgin	50.00	Thompson & Co.	50.00					
	5	John W. Shaffer & Co.	2,676.75(C)	Approaches			2,676.75			
	8	A. J. Schunk, Postmaster	21.31	Postage					21.31	
	10	E. C. Stockland	14.80	Travel and entertainment					14.80	
		(Forward)	$307,311.47		$170,513.71	$ 93,039.28	$ 17,202.76	$ 7,624.81	$ 11,043.60	$ 7,887.31

Date		Paid To	Amount	Account Charged	To Phoenix Group	To Shaffer & Co. On Four Contracts	Other Construction Costs	To S. S. H. Co. on Account	Expenses, Furniture, Equipment, Etc.	To Stockholders
1931		(Brought forward)	$307,311.47		$170,513.71	$ 93,039.28	$ 17,202.76	$ 7,624.81	$ 11,043.60	$ 7,887 31
June	10	E. C. Stockland	104.11	(Travel and entertainment					98.95	
				(Telephone and telegraph					5.16	
	11	Oscar R. Thorson	33.00	Travel and entertainment					33.00	
	13	Oscar R. Thorson	25.00	Travel and entertainment					25.00	
	13	E. W. Williams	221.08	Advertising and printing					221.08	
	13	E. W. Williams	19.50	Advertising and printing					19.50	
	15	Oscar R. Thorson	150.00	Salaries and wages					150.00	
	15	Muriel Johnston	50.00	Salaries and wages					50.00	
	15	Muriel Johnston	50.00	Salaries and wages					50.00	
	15	E. C. Stockland	50.00	Travel and entertainment					50.00	
	14	Nan Kronberg	4.00	Salaries and wages					4.00	
	17	Cramer & Hogg	1,000.00	Grading contractor		1,000.00				
	17	Cramer & Hogg	1,005.70(C)	Grading contractor		1,005.70				
	19	E. C. Stockland	109.15	Travel and entertainment					109.15	
	19	John W. Shaffer & Co.	2,000.00	Approaches			2,000.00			
	19	Iowa Plume Boat Works	300.00	Advertising and printing					300.00	
	6	General Printing Co.	80.84	Advertising and printing					80.84	
	20	R. R. Raggensack	15	Licenses, taxes and fees					15	
	20	Secretary of State—Wisconsin	7.00	Licenses, taxes and fees					7.00	
	20	Thompson & Co.	3.90	Thompson & Co.	3.90					
	20	John W. Shaffer & Co.	467.31	Approaches			467.31			
	20	E. Julsin	100.00	Right-of-way			100.00			
	20	Postmaster	20.06	Postage					20.06	
	20	Thearle-Duffield Fireworks Co.	1,120.00	Advertising and printing					1,120.00	
	20	Barnes-Carruthers Co.	1,150.00	Advertising and printing					1,150.00	
	20	Chief Silver-Tongue	125.00	Advertising and printing					125.00	
	22	Interstate Power Co.	5.00	Rent, light and heat					5.00	
	22	Moretz Kerndt	100.00	Organization expense			100.00			
	22	Mendenhall	52.87	Advertising and printing					52.87	
	22	Julius Boeckle	13.00	Licenses, taxes and fees					13.00	
	22	H. C. Fiedler	87.55	Salaries and wages					87.55	
	23	E. W. Williams	1,503.83	(Rent, light and heat					59.00	
	23	E. W. Williams		(Telephone and telegraph					40.78	
	23	E. W. Williams		(Advertising and printing					669.28	
	23	E. W. Williams		(Postage					7.48	
	23	E. W. Williams		(Salaries and wages					619.50	
	23	E. W. Williams		(Travel and entertainment					107.79	
	24	John W. Shaffer & Co.	119.29	Advertising and printing					119.29	
	24	John H. Thompson	308.60	Advertising and printing					308.60	
	24	T. A. Kerndt	6.00	Advertising and printing					6.00	
	24	N. W. Bell Telephone Co.	6.25	Telephone and telegraph					6.25	
	26	Thompson & Co.	600.00	Thompson & Co.	600.00					
	26	Thompson & Co.	600.00	Thompson & Co.	600.00					
	26	Oscar R. Thorson	44.10	Travel and entertainment					44.10	
	26	Thompson & Co.	262.39	Thompson & Co.	262.39					
	26	Thompson & Co.	2,400.00	Thompson & Co.	2,400.00					
	26	Mrs. Amelia Buege	2.25	Salaries and wages					2.25	
	26	W. C. Steiber	22.40	Salaries and wages					22.40	
		(Forward)	$321,936.90		$174,676.19	$ 95,044.98	$ 19,870.07	$ 7,624.81	$ 16,833.63	$ 7,887.31

Date		Paid To	Amount	Account Charged	To Phoenix Group	To Shaffer & Co. On Four Contracts	Other Construction Costs	To S. S. H. Co. on Account	Expenses, Furniture, Equipment, Etc.	To Stockholders
1931		(Brought forward)	$321,936 90		$174,676 10	$ 95,044 98	$ 19,870 07	$ 7,624 81	$ 16,833 63	$ 7,887 31
June	27	Clemon Peters	20 80	Salaries and wages					20 80	
	30	Cash	25 00	Advertising and printing					25 00	
	30	W. G. Cavanaugh, Jr.	75	Miscellaneous expense					75	
	30	Oscar R. Thorson	150 00	Salaries and wages					150 00	
	30	Oscar R. Thorson	15 80	Bridge income, toll refund					15 80	
	30	Iowa State Highway Comm.	5 00	Advertising and printing					5 00	
	30	N. W. Bell Telephone Co.	96 20	Telephone and telegraph					96 20	
	30	Standard Oil Co.	10 00	Travel and entertainment					10 00	
	30	Marquette National Bank	3 14	Licenses, taxes and fees					3 14	
July	1	Model Clothing Store	4 00	Stationery and supplies					4 00	
	1	Western Union Telegraph Co.	1 73	Telephone and telegraph					1 73	
	1	Jas. Gosulin	26 00	Salaries and wages					26 00	
	2	T. A. Bechtel	2 96	Miscellaneous expense					2 96	
	2	C. M. & St. Paul & Pacific Ry.	88	Miscellaneous expense					88	
	2	John W. Shaffer & Co.	1,000 00	Engineering contractor		1,000 00				
	2	A. W. O'Connor	17 16	Travel and entertainment					17 16	
	2	Thompson & Co.	1,000 00	Thompson & Co.	1,000 00					
	3	Postmaster	5 00	Postage					5 00	
	3	N. W. Bell Telephone Co.	26 85	Telephone and telegraph					26 85	
	3	Wisconsin Highway Comm.	8 00	Licenses, taxes and fees					8 00	
	3	Earl Wheeler	100 00	Advertising and printing					100 00	
	7	John Burke	35 00	Salaries and wages					35 00	
	7	James Mooney	35 00	Salaries and wages					35 00	
	7	Geo. Gonyier	35 00	Salaries and wages					35 00	
	7	Thompson & Co.	1,500 00	Thompson & Co.	1,500 00					
	7	John W. Shaffer & Co.	902 80	Approaches			902 80			
	9	Postmaster	10 00	Postage					10 00	
	9	L. A. Ranney	60	Miscellaneous expense					60	
	10	Dividend checks	4,556 24	Dividends						4,556 24
	9	John W. Shaffer & Co.	433 79	Approaches			433 79			
	10	May Burke	8 00	Salaries and wages					8 00	
	10	Julius Boeckle	21 97	Advertising and printing					21 97	
	10	L. A. Barthell	9 00	Advertising and printing					9 00	
	11	Greenley's Electric Co.	61 86	(Rent, light and heat					3 36	
				(Lighting			58 50			
	11	Allamakee Journal	43 05	Advertising and printing					43 05	
	11	Black Hawk Baseball Club	11 00	Advertising and printing					11 00	
	11	LaCrosse Tribune Co.	75	Advertising and printing					75	
	10	Pierson Wilcox Elect. Co.	26 80	Advertising and printing					26 80	
	10	Ben Bear Co.	4 00	Advertising and printing					4 00	
	11	General Printing Co.	40 75	Advertising and printing					40 75	
	11	Dr. A. R. Frederickson	9 00	Advertising and printing					9 00	
	11	W. K. B. H.	34 00	Advertising and printing					34 00	
	11	Waterloo Broadcasting Co.	28 00	Advertising and printing					28 00	
	11	The Lind Studio	113 25	Advertising and printing					113 25	
	11	Beckowitz Envelope Co.	16 80	Advertising and printing					16 80	
	11	Maynard Stohr Printing Co.	6 10	Advertising and printing					6 10	
	11	Amunson Pub. Co.	6 50	Advertising and printing					6 50	
	11	Twin City Stamp & Stencil Co.	50 00	Advertising and printing					50 00	
	11	Hawkeye Plate & Matrix Co.	1 28	Advertising and printing					1 28	
	11	Universal Circular Letter Co.	9 14	Advertising and printing					9 14	
		(Forward)	$332,465 85		$177,176 10	$ 96,044 98	$ 21,265 16	$ 7,624 81	$ 17,911 25	$12,443 55

Date		Paid To	Amount	Account Charged	To Phoenix Group	To Shaffer & Co. On Four Contracts	Other Construction Costs	To S. S. H. Co. on Account	Expenses, Furniture, Equipment, Etc.	To Stockholders
		(Brought forward)	$332,465.85		$177,176.10	$ 96,044.98	$ 21,235.16	$ 7,624.81	$ 17,911.25	$12,443.55
1931										
July	11	Imperial Printing Co	9.40	Advertising and printing					9.40	
	11	Frank Plagge	16.20	Advertising and printing					16.20	
	11	Bureau of Engraving	98.96	Advertising and printing					98.96	
	11	Farnham Prtg. and Staty. Co.	8.80	Stationery and supplies					8.80	
	11	Peoples State Bank	200.00	Thompson & Co.	200.00					
	11	Des Moines Rubber Stamp Works	5.75	Stationery and supplies					5.75	
	11	Schafer Bros.	7.00	Stationery and supplies					7.00	
	11	M. L. Rothschild & Co.	85.35	Stationery and supplies					85.35	
	11	Henry Martinson	3.50	Miscellaneous expense					3.50	
	11	Hoff Rubber Stamp Works	1.60	Stationery and supplies					1.60	
	11	Phoenix Leasehold, Inc.	1.97	Rent, light and heat					1.97	
	11	The Bi County Argus	1.50	Licenses, taxes and fees					1.50	
	11	Mid Way Hardware Co.	6.17	Stationery and supplies					6.17	
	11	Lyle Signs Co.	4.00	Approaches			4.00			
	11	Gilbertson-Schafer & Co.	6.90	Miscellaneous expense					6.90	
	11	Burroughs Adding Machine Co.	6.15	Miscellaneous expense					6.15	
	11	Chippewa Springs Corp.	7.00	Miscellaneous expense					7.00	
	11	Postal Telegraph & Cable Co.	3.48	Telephone and telegraph					3.48	
	11	Western Union Telegraph Co.	21.75	Telephone and telegraph					21.75	
	11	Mrs. Amelia Buege	3.25	Salaries and wages					3.25	
	11	Chris Peterson	27.29	(Thompson & Co. (T.H.B.)	1.50					
				(Travel and entertainment					25.79	
	13	Interstate Power Co.	.66	Rent, light and heat					.66	
	13	Phoenix Leasehold, Inc.	1.49	Rent, light and heat					1.49	
	14	Thompson & Co.	6,992.96	Thompson & Co.	6,992.96					
	17	A. D. Smith	1.50	Dividend						1.50
	15	John Burke	37.50	Salaries and wages					37.50	
	15	Geo. Gonyier	37.50	Salaries and wages					37.50	
	15	N. C. Steiber	18.75	Salaries and wages					18.75	
	15	Oscar R. Thorson	150.00	Salaries and wages					150.00	
	17	Oscar R. Thorson	13.85	(Telephone and telegraph					4.00	
				(Advertising and printing					3.70	
				(Travel and entertainment					6.15	
	17	W. Clute	9.38	(Advertising and printing					2.30	
				(Postage					3.28	
				(Miscellaneous expense					3.80	
	1	John W. Shaffer & Co.	1,174.14	Approaches			1,174.14			
	17	Joe Teff	8.80	Lighting			8.80			
	17	John W. Shaffer & Co.	1,473.06	Lighting			1,473.06			
	18	Thompson & Co.	1,000.00	Thompson & Co.	1,000.00					
	21	Standard Oil Co.	10.00	Travel and entertainment					10.00	
	22	The Ford Co.	62.50)							
	22	Wm. Weis	20.00)							
	22	Arthur Olloff	17.50)							
	22	Joe Damond	14.00)							
	22	Dan Spoor	15.75)							
	22	Bill Gee	17.50)							
	22	Ed. Ogen	62.50)	Approaches			285.50			
	22	Arthur Lang	17.50)							
	22	Bud Caver	7.00)							
	22	Wm. Nelson	25.00)							
	22	L. A. Ranney	6.25)							
	22	James Cole	20.00)							

Cash Disbursements (Cont'd)

Date	Paid To	Amount	Account Charged	To Phoenix Group	To Shaffer & Co. On Four Contracts	Other Construction Costs	To S. S. H. Co. on Account	Expenses, Furniture, Equipment, Etc.	To Stockholders
	(Brought forward)	$344,206.96		$185,370.56	$ 96,044.98	$ 24,210.66	$ 7,624.81	$ 18,510.90	$12,445.05
1931									
July 23	Thompson & Co.	2,500.00	Thompson & Co.	2,500 00					
25	John Cassidy	1.35	Miscellaneous expense					1.35	
25	Wm. Nelson	30 00)							
25	The Ford Co.	58.75)							
25	Wm. Weis	24.00)							
25	Arthur Ohoff	21.00)							
25	Joe Damond	21.00)							
25	Dan Spoor	21.00)							
25	Bill Gee	21 00)							
25	Ed Ogen	75 00)							
25	Bud Caver	21.00)	Approaches			462.67			
25	James Cole	24 00)							
25	Hugh Conway	14 00)							
25	Frank Parmer	8.75)							
25	George Billings	8.75)							
25	Harold Cole	7 00)							
25	Fred Phillips	8.75)							
25	Connie Phillips	7 00)							
25	Rudolph Dreyer	5.25)							
25	Howard Billings	8.75)							
25	Arthur Lang	21 00)							
25	L. A. Ranney	31.67)							
25	Guy Calhoun	12.50)							
25	Stacy Selbaugh	12.50)							
25	Postmaster	1.24	Miscellaneous expense					1.24	
25	Mrs. Amelia Buege	3.00	Salaries and wages					3.00	
25	Orvin J. Bartlett	30.00	Miscellaneous expense					30.00	
30	Thompson & Co.	1,500 00	Thompson & Co.	1,500 00					
30	Thompson & Co.	3,500 00	Thompson & Co.	3,500 00					
30	Aschour Bros.	16.48	Approaches			16.48			
31	T. A. Bechtel	.65	Miscellaneous expense					.65	
31	Western Union Telegraph Co.	.69	Telephone and telegraph					.69	
31	Postmaster	15.03	Postage					15.03	
31	Oscar R. Thorson	150.00	Salaries and wages					150.00	
31	Stacy Selbaugh	3.75)							
31	Elmer Williams	10.50)							
31	The Ford Co.	62.50)							
31	Wm. Weis	26.00)							

25	Wm. Weis	24 00)						
25	Arthur Olloff	21 00)						
25	Joe Damond	21 00)						
25	Dan Spoor	21 00)						
25	Bill Gee	21 00)						
25	Ed Ogen	75 00)						
25	Bud Caver	21 00)	Approaches			462 67		
25	James Cole	24 00)						
25	Hugh Conway	14 00)						
25	Frank Parmer	8 75)						
25	George Billings	8 75)						
25	Harold Cole	7 00)						
25	Fred Phillips	8 75)						
25	Connie Phillips	7 00)						
25	Rudolph Dreyer	5 25)						
25	Howard Billings	8 75)						
25	Arthur Lang	21 00)						
25	L. A. Ranney	31 67)						
25	Guy Calhoun	12 50)						
25	Stacy Selbaugh	12 50)						
25	Postmaster	1 24	Miscellaneous expense					1 24
25	Mrs. Amelia Buege	3 00	Salaries and wages					3 00
25	Orvin J. Bartlett	30 00	Miscellaneous expense					30 00
30	Thompson & Co.	1,500 00	Thompson & Co.	1,500 00				
30	Thompson & Co.	3,500 00	Thompson & Co.	3,500 00				
30	Aschour Bros.	16 48	Approaches			16 48		
31	T. A. Bechtel	65	Miscellaneous expense					65
31	Western Union Telegraph Co.	69	Telephone and telegraph					69
31	Postmaster	15 03	Postage					15 03
31	Oscar R. Thorson	150 00	Salaries and wages					150 00
31	Stacy Selbaugh	3 75)						
31	Elmer Williams	10 50)						
31	The Ford Co.	62 50)						
31	Wm. Weis	26 00)						
31	Arthur Olloff	17 50)						
31	Joe Damond	17 50)						
31	Bill Gee	17 50)						
31	Dan Spoor	17 50)						
31	Ed. Ogen	62 50)						
31	Ad. Long	21 00)	Approaches			409 75		
31	Bud Cavers	17 50)						
31	Wm. Nelson	35 00)						
31	James Cole	24 00)						
31	Harold Cole	17 50)						
31	Geo. Billings	10 50)						
31	Howard Billings	7 00)						
31	Frank Parmer	10 50)						
31	Connie Williams	7 00)						
31	Rudolph Dreyer	7 00)						
31	Hugh Conway	7 00)						
31	Fred Phillips	10 50)						
31	James Mooney	42 50	Salaries and wages					42 50
31	Geo. Gonyier	37 50	Salaries and wages					37 50
	(Forward)	$352,877 82		$192,870 56	$ 96,044 98	$ 25,099 56	$ 7,624 81	$ 18,792 86	$12,445 05

Cash Disbursements (Cont'd)

Date		Paid To	Amount	Account Charged	To Phoenix Group	To Shaffer & Co. On Four Contracts	Other Construction Costs	To S. S. H. Co. on Account	Expenses, Furniture, Equipment, Etc.	To Stockholders
		(Brought forward)	$352,877.82		$192,870.56	$ 96,044.98	$ 25,099.56	$ 7,624.81	$ 18,792.86	$12,445.05
1931										
July	31	John Burke	37.50	Salaries and wages						
	31	Bradshaw, Schenk & Fowler	1,151.58	Licenses, taxes and fees	24.00				37.50	
	31	Geo. E. Billings	25.90	Approaches					1,127.58	
	31	Mrs. R. Bakewell	30.50	Travel and entertainment			25.90			
	31	Marquette National Bank	.17	Licenses, taxes and fees					30.50	
Aug.	3	Geo. Volkert	6.75	Miscellaneous expense					.17	
	3	N. W. Bell Telephone Co.	67.50	Telephone and telegraph					6.75	
	4	Thompson & Co.	1,000.00	Thompson & Co.	1,000.00				67.50	
		August 6, 1931 — Subtotal	$355,197.72		$193,894.56	$ 96,044.98	$ 25,125.46	$ 7,624.81	$ 20,062.86	$12,445.05
	7	Waterloo Laundry Co.	$ 1.30	Miscellaneous expense					1.30	
	7	Phoenix Leasehold, Inc.	84.00	Rent, light and heat					84.00	
	7	J. A. Thompson	2,503.91	Thompson & Co.	$ 2,503.91					
	7	John W. Shaffer & Co.	765.45	Approaches			$ 765.45			
	7	J. A. Thompson	1,000.00	Thompson & Co.	1,000.00					
	8	Thompson & Co.	2,000.00	Thompson & Co.	2,000.00					
	9	John Donnellan	5.63)							
	8	Ed. Ogen	20.00)							
	8	Wm. Nelson	30.75)							
	8	James Cole	24.00)							
	8	Wm. Weis	24.00)							
	8	Harold Cole	6.65)							
	8	Ad. Long	10.50)							
	8	Arthur Olloff	3.15)	Approaches			174.09			
	8	Bill Gee	3.15)							
	8	Hugh Conway	3.50)							
	8	The Ford Co.	13.13)							
	8	Connie Williams	7.00)							
	8	Rudolph Dreyer	7.00)							
	8	W. Christianson	10.00)							
	8	E. T. Stabler	5.63)							
	8	Mrs. Amelia Buege	3.00	Salaries and wages					3.00	
	8	W. C. Steiber	7.50	Salaries and wages					7.50	
	11	Interstate Power Co.	26.52	Rent, light and heat					26.52	
	13	Oscar R. Thorson	20.50	Travel and entertainment					20.50	
	14	Thompson & Co.	2,000.00	Thompson & Co.	2,000.00					
	14	Postmaster	5.00	Postage					5.00	
	15	Oscar R. Thorson	200.00	Salary and wages					200.00	
	15	James Mooney	37.50	Salary and wages					37.50	
	15	John Burke	37.50	Salary and wages					37.50	
	15	Geo. Gonyier	37.50	Salary and wages					37.50	
	15	Mrs. Amelia Buege	1.50	Salary and wages					1.50	
	15	Wm. Nelson	30.00)							
	[illegible]	[illegible]	24.00)							

	August 6, 1931 -- Subtotal	$355,197.72		$193,894.56	$ 96,044.98	$ 25,125.46	$ 7,624.81	$ 20,062.86	$12,445.05
7	Waterloo Laundry Co.	$ 1.30	Miscellaneous expense					1.30	
7	Phoenix Leasehold, Inc.	84.00	Rent, light and heat					84.00	
7	J. A. Thompson	2,503.91	Thompson & Co.	$ 2,503.91					
7	John W. Shaffer & Co.	765.45	Approaches			$ 765.45			
7	J. A. Thompson	1,000.00	Thompson & Co.	1,000.00					
8	Thompson & Co.	2,000.00	Thompson & Co.	2,000.00					
9	John Donnellan	5.63)							
8	Ed. Ogen	20.00)							
8	Wm. Nelson	30.75)							
8	James Cole	24.00)							
8	Wm. Weis	24.00)							
8	Harold Cole	6.65)							
8	Ad. Long	10.50)							
8	Arthur Olloff	3.15)	Approaches			174.09			
8	Bill Gee	3.15)							
8	Hugh Conway	3.50)							
8	The Ford Co.	13.13)							
8	Connie Williams	7.00)							
8	Rudolph Dreyer	7.00)							
8	W. Christianson	10.00)							
8	E. T. Stabler	5.63)							
8	Mrs. Amelia Buege	3.00	Salaries and wages					3.00	
8	W. C. Steiber	7.50	Salaries and wages					7.50	
11	Interstate Power Co.	26.52	Rent, light and heat					26.52	
13	Oscar R. Thorson	20.50	Travel and entertainment					20.50	
14	Thompson & Co.	2,000.00	Thompson & Co.	2,000.00					
14	Postmaster	5.00	Postage					5.00	
15	Oscar R. Thorson	200.00	Salary and wages					200.00	
15	James Mooney	37.50	Salary and wages					37.50	
15	John Burke	37.50	Salary and wages					37.50	
15	Geo. Gonyier	37.50	Salary and wages					37.50	
15	Mrs. Amelia Buege	1.50	Salary and wages					1.50	
15	Wm. Nelson	30.00)							
15	James Cole	24.00)							
15	Wm. Weis	24.00)	Approaches			104.60			
15	Harold Cole	3.50)							
15	Connie Williams	2.80)							
15	Rudolph Dreyer	2.80)							
15	Ad. Long	17.50)							
17	Oscar R. Thorson	300.00	Travel and entertainment					300.00	
19	Thompson & Co.	500.00	Thompson & Co.	500.00					
20	Greenley's Electric Shop	13.71	Lighting			13.71			
20	Julius Reith Estate	64.58	Approaches			64.58			
20	Jacobson Furniture Exchange	44.95	Furniture and fixtures					44.95	
20	Allamakee Journal	139.35	Advertising and printing					139.35	
		$365,270.18		$201,898.47	$ 96,044.98	$ 26,247.89	$ 7,624.81	$ 21,008.98	$12,445.05

Cash Disbursements (Cont'd)

Date	Paid To	Amount	Account Charged	To Phoenix Group	To Shaffer & Co. On Four Contracts	Other Construction Costs	To S. S. H. Co. on Account	Expenses, Furniture, Equipment, Etc.	To Stockholders
	(Brought forward)	$365,270.18		$201,898.47	$ 96,044.98	$ 26,247.89	$ 7,624.81	$ 21,008.98	$12,445.05
1931									
Aug. 20	P. E. Rethwisch	62.90	(Toll House			32.40			
			(Advertising and printing					30.50	
20	H. A. Rogers	5.30	Advertising and printing					5.30	
20	The Journal Co.	.65	Advertising and printing					.65	
20	The Milwaukee Journal	4.00	Advertising and printing					4.00	
20	Maynard Stohr Printing Co.	31.40	Stationery and supplies					31.40	
20	The LaCrosse Tribune Co.	2.55	Advertising and printing					2.55	
20	Farnham Printing Co.	1.10	Stationery and supplies					1.10	
20	Postal Telegraph Co.	1.23	Telephone and telegraph					1.23	
20	Waukon Greenhouses	5.00	Miscellaneous expense					5.00	
20	W. C. Martinson	43.74	(Rent, light and heat					40.00	
			(Miscellaneous expense					3.74	
21	Collector Internal Revenue	31.50	License, taxes and fees					31.50	
20	Secretary of State	1.00	License, taxes and fees					1.00	
21	Leo Hurm	46.50)							
21	Wm. Nelson	30.00)							
21	James Cole	24.00)	Approaches			145.50			
22	Wm. Weis	24.00)							
22	Ad. Long	21.00)							
24	C. M. St. Paul & P. Ry. Co.	.61	Miscellaneous expense					.61	
24	Postmaster	60.18	Postage					60.18	
25	Mrs. Victor Bradburn	2.50	Salaries and wages					2.50	
28	F. Michelsen	22.00	Approaches			22.00			
27	Postmaster	30.09	Postage					30.09	
22	Mrs. Amelia Buege	1.50	Salaries and wages					1.50	
28	Wm. Nelson	29.50)							
28	James Cole	25.00)	Approaches			98.13			
28	Wm. Weis	23.40)							
28	Ad. Long	20.48)							
29	Mrs. Amelia Buege	1.50	Salaries and wages					1.50	
29	Oscar R. Thorson	58.40	Travel and entertainment					58.40	
29	Tillman Michelsen	35.00	Approaches			35.00			
31	Oscar R. Thorson	200.00	Salaries and wages					200.00	
31	Jas. Mooney	37.50	Salaries and wages					37.50	
31	John Burke	37.50	Salaries and wages					37.50	
31	Geo. Gonyier	37.50	Salaries and wages					37.50	
31	Vance Thompson	200.00	Vance Thompson					200.00	
31	Howard Billings	.50	Approaches			.50			

20	The Journal Co.	.65	Advertising and printing				.65	
20	The Milwaukee Journal	4 00	Advertising and printing				4 00	
20	Maynard Stohr Printing Co.	31 40	Stationery and supplies				31 40	
20	The LaCrosse Tribune Co.	2 55	Advertising and printing				2 55	
20	Farnham Printing Co.	1 10	Stationery and supplies				1 10	
20	Postal Telegraph Co.	1 23	Telephone and telegraph				1 23	
20	Waukon Greenhouses	5 00	Miscellaneous expense				5 00	
20	W. C. Martinson	43 74	(Rent, light and heat				40 00	
			(Miscellaneous expense				3 74	
21	Collector Internal Revenue	31 50	License, taxes and fees				31 50	
20	Secretary of State	1 00	License, taxes and fees				1 00	
21	Leo Hurm	46 50)						
21	Wm. Nelson	30 00)						
21	James Cole	24 00)	Approaches		143 50			
22	Wm. Weis	24 00)						
22	Ad. Long	21 00)						
24	C. M. St. Paul & P. Ry. Co.	61	Miscellaneous expense				61	
24	Postmaster	60 18	Postage				60 18	
25	Mrs. Victor Bradburn	2 50	Salaries and wages				2 50	
28	F. Michelsen	22 00	Approaches		22 00			
27	Postmaster	30 09	Postage				30 09	
22	Mrs. Amelia Buege	1 50	Salaries and wages				1 50	
28	Wm. Nelson	29 50)						
28	James Cole	25 00)	Approaches		98 13			
28	Wm. Weis	23 40)						
28	Ad. Long	20 48)						
29	Mrs. Amelia Buege	1 50	Salaries and wages				1 50	
29	Oscar R. Thorson	58 40	Travel and entertainment				58 40	
29	Tillman Michelsen	35 00	Approaches		35 00			
31	Oscar R. Thorson	200 00	Salaries and wages				200 00	
31	Jas. Mooney	37 50	Salaries and wages				37 50	
31	John Burke	37 50	Salaries and wages				37 50	
31	Geo. Gonyier	37 50	Salaries and wages				37 50	
31	Vance Thompson	200 00	Vance Thompson				200 00	
31	Howard Billings	50	Approaches		50			
Sept. 2	Cash	1 22	Telephone and telegraph				1 22	
2	John W. Shaffer & Co.	12 25	Telephone and telegraph				12 25	
4	N. W. Bell Telephone Co.	20 65	Telephone and Telegraph				20 65	
4	Postmaster	20 06	Postage				20 06	
5	Oscar R. Thorson	400 00	Salaries and wages				400 00	
5	Tillman Michelsen	111 00	Approaches		111 00			
5	Wm. Nelson	30 00)						
5	Jas. Cole	20 00)	Approaches		87 50			
5	Wm. Weis	20 00)						
5	Ad. Long	17 50)						
5	Thompson & Co.	1,000 00	Thompson & Co.	1,000 00				
5	Lenore Spinner	15 00	Salaries and Wages				15 00	
8	J. F. Bechtel	7 80	Approaches		7 80			
9	Oscar R. Thorson	2 50	Furniture and fixtures				2 50	
10	Mary Burke	5 50	Salaries and wages				5 50	
10	Thompson & Co.	5,000 00	Thompson & Co.	5,000 00				
11	F. C. Fish Sign Co.	150 00	Advertising and printing				150 00	
12	Wm. Nelson	25 00	Approaches		25 00			
	(Forward)	$373,287 44		$207,898 47	$ 96,044 98	$ 26,812 72	$ 7,624 81	$ 22,461 41	$12,445 05

Date	Paid To	Amount	Account Charged	To Phoenix Group	To Shaffer & Co. On Four Contracts	Other Construction Costs	To S. S. H. Co. on Account	Expenses, Furniture, Equipment, Etc.	To Stockholders
	(Brought forward)	$373,287.44		$207,898.47	$ 96,044.98	$ 26,812.72	$ 7,624.81	$ 22,461.41	$12,445.05
1931									
Sept. 12	Week & Milne	229.90	Advertising and printing					229.90	
12	Interstate Power Co.	45.00	Rent, light and heat					45.00	
12	Mrs. Amelia Buege	3.00	Salaries and wages					3.00	
14	W. K. B. H.	15.00	Advertising and printing					15.00	
15	National Cash Register Co.	513.00	Furniture and fixtures					513.00	
15	S. M. Johnson	10.00	Furniture and fixtures					10.00	
15	Oscar R. Thorson	200.00	Salaries and wages					200.00	
15	Jas. Mooney	37.50	Salaries and wages					37.50	
15	John Burke	37.50	Salaries and wages					37.50	
15	Geo. Gonyier	37.50	Salaries and wages					37.50	
18	Edw. Beusch	4.50	Approaches			4.50			
19	Wm. Nelson	29.50)							
19	Wm. Weis	15.60)							
19	Ad. Long	13.65)	Approaches			5.00			
19	Jas. Cole	15.60)	Substructure			88.60			
19	Bud Nelson	1.75)							
19	Ray Hartman	17.50)							
19	John Bechtel	.90	Approaches			.90			
19	Oscar R. Thorson	55.00	Travel and entertainment					55.00	
21	John H. Thompson	75.00	Salaries and wages					75.00	
16	Thompson & Co.	400.00	Thompson & Co.	400.00					
22	J. H. Thompson	18.25	Licenses, taxes and fees (Trans. to Ins.)					18.25	
23	Vance Thompson	15.00	Vance Thompson					15.00	
23	McKenzie & Kileen Co.	978.80	Approaches			978.80			
23	Bernard S. Wertz	40.00	Vance Thompson					40.00	
23	W. White	15.00	Vance Thompson					15.00	
23	Oscar R. Thorson	11.95	(Vance Thompson					10.00	
			(Miscellaneous expense					.75	
			(Traveling expense					1.20	
25	Postmaster	1.00	Postage					1.00	
26	Wm. Nelson	28.50)							
26	Wm. Weis	21.40)							
26	Ad. Long	18.73)							
26	James Cole	22.80)	Substructure contractor			140.78			
26	Ray Hartman	3.50)							
26	Bud Nelson	37.10)							
26	Bill Gee	8.75)							
26	Ford Garage	3.75)							
26	John Bechtel	2.40)	Approaches			11.75			
26	Chris Ronfelt	5.60)							
29	Fred Schafer	15.00	Advertising and printing					15.00	
30	Thompson & Co.	400.00	Thompson & Co.	400.00					
30	Oscar R. Thorson	200.00	Salaries and wages					200.00	
30	Jas. Mooney	37.50	Salaries and wages					37.50	
30	John Burke	37.50	Salaries and wages					37.50	
30	Geo. Gonyier	37.50	Salaries and wages					37.50	
30	Vance Thompson	70.00	Salaries and wages						
30	C. M. & St. P. & P. Ry.	1.47	Miscellaneous expense						
30	Western Union Telegraph Co	.91	Telephone and telegraph						
30	Peoples State Bank	29.11	Licenses, taxes and fees						
30	N. C. Martinson	40.00	Rent, light and heat						
30	County Recorder	1.00	Licenses, taxes and fees						
30	Postmaster	1.00	Miscellaneous expense						

Cash Disbursements (Cont'd)

Date	Paid To	Amount	Account Charged	To Phoenix Group	To Shaffer & Co. On Four Contracts	Other Construction Costs	To S. S. H. Co. on Account	Expenses, Furniture, Equipment, Etc.	To Stockholders
	(Brought forward)	$377,148.36		$208,698.47	$ 96,644.98	$ 28,043.05	$ 7,624.81	$ 24,292.00	$12,445.05
1931									
Sept. 30	Lenore Spinner	1.15	Salaries and wages					1.15	
Oct. 3	Wm. Nelson	30.00)							
3	Wm. Weis	24.00)							
3	Ad. Long	21.00)	Approaches			116.40			
3	James Cole	20.40)							
3	Bill Gee	21.00)							
3	Mrs. Amelia Buege	4.50	Salaries and wages					4.50	
4	N. W. Bell Telephone Co.	21.60	Telephone and telegraph					21.60	
4	Interstate Power Co.	45.00	Rent, light and heat					45.00	
4	Oscar R. Thorson	48.84	Travel and entertainment					48.84	
3	John Bechtel	35.00	Toll House			35.00			
7	G. W. Fidlar	25.00	Miscellaneous expense					25.00	
6	Iowa Des Moines Nat'l. Bank	10,000.00	(Steel (belongs in Superstructure-Extras)			3,306.00			
			(Piling (belongs in Superstructure-Extras)			3,378.05			
			(Approaches (belongs in Superstructure-Extras)			1,220.00			
			(Substructure (belongs in Superstructure-Extras)			2,095.95			
8	Phoenix Finance System, Inc.	2.00	Postage					2.00	
9	County Recorder	6.25	Licenses, taxes and fees					6.25	
9	Leo Hurm	35.10)							
12	Wm. Nelson	30.00)							
12	Wm. Gee	21.00)	Approaches			107.10			
12	Ad. Long	21.00)							
12	James Cole	20.00	Toll House			20.00			
12	Wm. Weis	16.20	Approaches			16.20			
15	Oscar Thorson	200.00	Salaries and wages					200.00	
15	Vance Thompson	70.00	Salaries and wages					70.00	
15	James Mooney	37.50	Salaries and wages					37.50	
15	John Burke	37.50	Salaries and wages					37.50	
15	George Gonyier	37.50	Salaries and wages					37.50	
15	Mrs. Amelia Buege	3.00	Salaries and wages					3.00	
16	Greenley's Electric Shop	22.53	(Toll House			13.73			
			(Lighting			8.40			

3	Mrs. Amelia Buege	4.50	Salaries and wages					4.50
4	N. W. Bell Telephone Co.	21.60	Telephone and telegraph					21.60
4	Interstate Power Co.	45.00	Rent, light and heat					45.00
4	Oscar R. Thorson	48.84	Travel and entertainment					48.84
3	John Bechtel	35.00	Toll House		35.00			
7	G. W. Fidlar	25.00	Miscellaneous expense					25.00
6	Iowa Des Moines Nat'l. Bank	10,000.00	(Steel (belongs in Superstructure-Extras)		3,306.00			
			(Piling (belongs in Superstructure-Extras)		3,778.05			
			(Approaches (belongs in Superstructure-Extras)		1,220.00			
			(Substructure (belongs in Superstructure-Extras)		2,095.95			
8	Phoenix Finance System, Inc.	2.00	Postage					2.00
9	County Recorder	6.25	Licenses, taxes and fees					6.25
9	Leo Hurm	35.10)						
12	Wm. Nelson	30.00)						
12	Wm. Gee	21.00)	Approaches		107.10			
12	Ad. Long	21.00)						
12	James Cole	20.00	Toll House		20.00			
12	Wm. Weis	16.20	Approaches		16.20			
15	Oscar Thorson	200.00	Salaries and wages					200.00
15	Vance Thompson	70.00	Salaries and wages					70.00
15	James Mooney	37.50	Salaries and wages					37.50
15	John Burke	37.50	Salaries and wages					37.50
15	George Gonyier	37.50	Salaries and wages					37.50
15	Mrs. Amelia Buege	3.00	Salaries and wages					3.00
16	Greenlay's Electric Shop	22.53	(Toll House		13.73			
			(Lighting		8.40			
			(Rent, light and heat					.40
16	The Lind Studio	15.50	Advertising and printing					15.50
16	LaCrosse Sign & Adv. Co.	19.50	Advertising and printing					19.50
16	Allamakee Journal	54.50	(Advertising and printing					43.00
			(Stationery and supplies					11.50
16	M. L. Rothschild	16.00	Stationery and supplies					16.00
16	Ruff Rubber Stamp Co.	1.75	Stationery and supplies					1.75
15	Watchweg Drug Store	1.20	Stationery and supplies					1.20
16	Geo. M. Metcalf	18.40	Stationery and supplies					18.40
16	S. M. Johnson	4.28	Stationery and supplies					4.28
16	Julius Reith Estate	1.31	Toll House and misc. expense		.50			.81
16	J. Torrence & Son	13.75	Toll House		13.75			
16	August H. Rains	22.70	Toll House		22.70			
16	Standard Glass & Paint	1.98	Toll House		1.98			
16	V. Tausche Hardware Co.	55.25	(Toll House		16.25			
			(Furniture and fixtures					39.00
16	Gilbertson & Schaefer Co.	11.20	Toll House		11.20			
16	D. F. Wolfe	51.00	Salaries and wages					51.00
16	Kehn Bros.	53.65	(Approaches		40.80			
			(Toll House		1.23			
			(Stationery and Supplies					1.05
			(Miscellaneous expense					10.57
16	Erickson & Paulson	3.50	Approaches		3.50			
	(Forward)	$388,350.90		$208,698.47	$ 96,044.98	$ 38,471.79	$ 7,624.81	$ 25,065.80	$12,445.05

Cash Disbursements (Cont'd)

Date		Paid To	Amount	Account Charged	To Phoenix Group	To Shaffer & Co. On Four Contracts	Other Construction Costs	To S. S. H. Co. on Account	Expenses, Furniture, Equipment, Etc.	To Stockholders
		(Brought forward)	$388,350.90		$208,698.47	$ 96,044.98	$ 38,471.79	$ 7,624.81	$ 25,065.80	$12,445.05
1931										
Oct.	20	Wm. Nelson	27.50	Approaches			27.50			
	20	Wm. Gee	19.25	Approaches			19.25			
	20	Ad. Long	21.00	Approaches			21.00			
	20	Wm. Weis	24.00	Approaches			24.00			
	20	James Cole	14.00	Toll House			14.00			
	20	Rome Ollof	1.00	Substructure			1.00			
	20	Bud Nelson	3.50	Approaches			3.50			
	20	Dave Nelson	3.50	Approaches			3.50			
	27	Allamakee Journal	6.00	Stationery and supplies					6.00	
	27	Wm. Nelson	27.50)							
	27	Wm. Gee	21.00)							
	27	Wm. Weis	24.00)	Approaches			114.00			
	27	James Cole	24.00)							
	27	Ad. Long	17.50)							
	27	Carl Kohlstadt	12.50	Toll House			12.50			
	28	James Mooney	22.50	Salaries and wages					22.50	
	29	Thompson & Co.	350.00	Thompson & Co.	350.00					
	31	Oscar Thorson	200.00	Salaries and wages					200.00	
	31	Vance Thompson	70.00	Salaries and wages					70.00	
	31	John Burke	37.50	Salaries and wages					37.50	
	31	Geo. Gonyier	37.50	Salaries and wages					37.50	
	30	Wm. Nelson	25.00	Approaches			25.00			
	30	Wm. Gee	17.50	Approaches			17.50			
	30	Wm. Weis	20.00	Approaches			20.00			
	30	James Cole	20.00	Approaches			20.00			
	30	Ad. Long	18.38	Approaches			18.38			
	30	Carl Kohlstadt	30.00	Toll House			30.00			
	31	Oscar R. Thorson	101.10	Toll House, Misc., Postage, Trav. and Tel. & Tel.			8.66		92.44	
	31	Gilbertson & Schafer	196.83	Substructure			196.83			
	31	F. L. May	1.62	Licenses, taxes and fees					1.62	
	31	J. Torrence & Son	2.00	Toll House			2.00			
	31	F. C. Fish Sign Service	102.50	Advertising and printing					102.50	
Nov.	3	N. W. Bell Telephone Co.	13.73	Telephone and telegraph					13.73	
	3	Postmaster	10.03	Postage					10.03	
	3	[illegible]	12.50)							

1931										
Oct.	20	Wm. Nelson	27.50	Approaches			27.50			
	20	Wm. Gee	19.25	Approaches			19.25			
	20	Ad. Long	21.00	Approaches			21.00			
	20	Wm. Weis	24.00	Approaches			24.00			
	20	James Cole	14.00	Toll House			14.00			
	20	Rome Ollof	1.00	Substructure			1.00			
	20	Bud Nelson	3.50	Approaches			3.50			
	20	Dave Nelson	3.50	Approaches			3.50			
	27	Allamakee Journal	6.00	Stationery and supplies					6.00	
	27	Wm. Nelson	27.50)							
	27	Wm. Gee	21.00)							
	27	Wm. Weis	24.00)	Approaches			114.00			
	27	James Cole	24.00)							
	27	Ad. Long	17.50)							
	27	Carl Kohlstadt	12.50	Toll House			12.50			
	28	James Mooney	22.50	Salaries and wages					22.50	
	29	Thompson & Co.	350.00	Thompson & Co.	350.00					
	31	Oscar Thorson	200.00	Salaries and wages					200.00	
	31	Vance Thompson	70.00	Salaries and wages					70.00	
	31	John Burke	37.50	Salaries and wages					37.50	
	31	Geo. Gonyier	37.50	Salaries and wages					37.50	
	30	Wm. Nelson	25.00	Approaches			25.00			
	30	Wm. Gee	17.50	Approaches			17.50			
	30	Wm. Weis	20.00	Approaches			20.00			
	30	James Cole	20.00	Approaches			20.00			
	30	Ad. Long	18.38	Approaches			18.38			
	30	Carl Kohlstadt	30.00	Toll House			30.00			
	31	Oscar R. Thorson	101.10	Toll House, Misc., Postage, Trav. and Tel. & Tel.			8.66		92.44	
	31	Gilbertson & Schafer	196.83	Substructure			196.83			
	31	F. L. May	1.62	Licenses, taxes and fees					1.62	
	31	J. Torrence & Son	2.00	Toll House			2.00			
	31	F. C. Fish Sign Service	102.50	Advertising and printing					102.50	
Nov.	3	N. W. Bell Telephone Co.	13.73	Telephone and telegraph					13.73	
	3	Postmaster	10.03	Postage					10.03	
	9	Wm. Nelson	12.50)							
	9	Wm. Gee	3.50)							
	9	Wm. Weis	24.00)							
	9	James Cole	5.60)	Approaches			79.10			
	9	Ad. Long	3.50)							
	9	Carl Kohlstadt	30.00)							
	9	B. A. Holbarsen	12.25	Toll House			12.25			
	9	Commercial Nat'l. Bank	.50	Licenses, taxes and fees					.50	
	9	N. C. Martinsen	26.33	Rent, light and heat					26.33	
	9	Interstate Power Co.	64.42	(Lighting			2.98			
				(Rent, light and heat					61.44	
	9	Mrs. Amelia Buege	7.00	Salaries and wages					7.00	
	9	J. A. Thompson	408.85	Travel and automobile					408.85	
	10	N. W. Bell Telephone Co.	1.70	Telephone and telegraph					1.70	
	10	Zaizers	.90	Stationery and supplies					.90	
	10	Kremer & Hog	9,000.00	Grading			9,000.00			
	11	J. H. Thompson	24.00	Travel and automobile					24.00	
	11	J. W. Dempsey	24.00	Travel and automobile					24.00	
	11	T. H. Bakewell	24.00	Travel and automobile					24.00	
		(Forward)	$399,546.39		$209,048.47	$ 96,044.98	$ 48,141.74	$ 7,624.81	$ 26,238.34	$12,445.05

Date		Paid To	Amount	Account Charged	To Phoenix Group	To Shaffer & Co. On Four Contracts	Other Construction Costs	To S. S. H. Co. on Account	Expenses, Furniture, Equipment, Etc.	To Stockholders
		(Brought forward)	$399,546.39		$209,048.47	$ 96,044.98	$ 48,144.74	$ 7,624.81	$ 26,238.34	$12,445.05
1931										
Nov.	11	Julius Boeckle	24.00	Travel and automobile					24.00	
	11	T. H. Wagner	24.00	Travel and automobile					24.00	
	11	W. L. Harding	100.00	Licenses, taxes and fees					100.00	
	11	Thompson & Co.	4,354.40	Thompson & Co.	4,354.40					
	12	Phoenix Finance System, Inc.	20.06	Postage					20.06	
	15	Oscar R. Thorson	200.00	Salaries and wages					200.00	
	15	Vance Thompson	60.00	Salaries and wages					60.00	
	15	John Burke	42.50	Salaries and wages					42.50	
	15	George Gonyier	42.50	Salaries and wages					42.50	
	20	Phoenix Finance System, Inc.	10.03	Postage					10.03	
	23	Wm. Nelson	16.00)							
	23	Wm. Weis	3.00)	Approaches			50.60			
	24	Wm. Weis	21.60)							
	24	Wm. Nelson	10.00)							
	24	Carl Kohlstadt	5.00	Miscellaneous expense					5.00	
	24	Charles J. Hedwall	96.24	Insurance					96.24	
	25	J. A. Thompson	266.95	Travel and automobile					266.95	
	30	Oscar R. Thorson	54.40	(Toll House			.60			
				(Furniture and fixtures					1.75	
				(Approaches			.75			
				(Stationery and supplies					1.70	
				(Miscellaneous					1.60	
				(Travel expense					48.00	
	30	Oscar R. Thorson	200.00	Salaries and wages					200.00	
	30	Vance Thompson	60.00	Salaries and wages					60.00	
	30	John Burke	42.50	Salaries and wages					42.50	
	30	George Gonyier	42.50	Salaries and wages					42.50	
	30	Wm. Nelson	10.00	Approaches			10.00			
	30	Wm. Weis	6.00	Approaches			6.00			
	30	Elliott Rodgerson Co.	125.00	Commissions			125.00			
Dec.	8	Wm. Nelson	10.75	Approaches			10.75			
	8	Wm. Weis	6.40	Approaches			6.40			
	8	Mrs. Buege	3.50	Salaries and wages					3.50	
	8	N. W. Bell Telephone Co.	13.50	Telephone and telegraph					13.50	
	8	Western Union Telegraph Co.	3.38	Telephone and telegraph					3.38	
	10	Elliott Rodgerson Co.	50.00	Commissions			50.00			
	11	Leo Hurm	30.80	Approaches			30.80			
	12	Interstate Power Co.	56.25	(Rent, light and heat					48.15	
				(Miscellaneous					8.10	
	12	N. W. Bell Telephone Co.	20.03	Telephone and telegraph					20.03	
	14	James Cole	2.63)							
	14	Wm. Weis	4.03)	Approaches			8.16			
	14	Wm. Nelson	1.50)							
	15	Vance Thompson	60.00	Salaries and wages					60.00	
	15	John Burke	42.50	Salaries and wages					42.50	
	15	George Gonyier	42.50	Salaries and wages					42.50	
	15	Oscar Thorson	200.00	Salaries and wages					200.00	
	19	M. White	21.41	Miscellaneous, Trav., S. & S., Postage and Telephone and Telegraph					21.41	
	21	James Cole	3.85	Approaches			3.85			
	26	Phoenix Finance System, Inc.	20.06	Postage					20.06	
		(Forward)	$405,976.16		$213,402.87	$ 96,044.98	$ 48,447.65	$ 7,624.81	$ 28,010.80	$12,445.05

Date	Paid To	Amount	Account Charged	To Phoenix Group	To Shaffer & Co. On Four Contracts	Other Construction Costs	To S. S. H. Co. on Account	Expenses, Furniture, Equipment, Etc.	To Stockholders
	(Brought forward)	$405,976.16		$213,402.87	$ 96,044.98	$ 48,447.65	$ 7,624.81	$ 28,010.80	$12,445.05
1931									
Dec. 26	McClinic Marshall Corp.	9,258.60	Steel, Superstructure—Extras			9,258.60			
28	Henry G. Foote, Jr.	20.88	Travel and automobile					20.88	
28	A. B. Wilder	20.88	Travel and automobile					20.88	
28	H. T. Wagner	12.15	Travel and automobile					12.15	
30	Clerk of Dist. Court	1.00	Licenses, taxes and fees					1.00	
31	Oscar R. Thorson	200.00	Salaries and wages					200.00	
31	Vance Thompson	60.00	Salaries and wages					60.00	
31	John Burke	42.50	Salaries and wages					42.50	
31	George Gonyier	42.50	Salaries and wages					42.50	
31	J. A. Thompson	13.00	Commissions			13.00			
31	J. A. Thompson	257.94	Travel and automobile					257.94	
31	Oscar R. Thorson	130.43	Travel and automobile					130.43	
31	Vance Thompson	14.47	Salaries and wages					14.47	
31	Cash	20.00	Licenses, taxes and fees					20.00	
31	Wilhelmina Boechk	500.00	Promotion			500.00			
31	S. M. Johnson	.93	Stationery and supplies					.93	
31	Maynard Stohr Printing Co.	46.11	Stationery and supplies					46.11	
31	Blue Line Storage Co.	2.57	Miscellaneous					2.57	
31	N. C. Martinsen	2.09	Miscellaneous					2.09	
31	City of Lansing	7.82	Miscellaneous					7.82	
31	Luethe Hardware Co.	5.17	Miscellaneous					5.17	
31	George C. Schulze	5.10)							
31	Andersons	6.00)	Toll House			67.55			
31	H. J. Burke	32.60)							
31	Greenley's Electric Sign	23.85)							
31	American Surety Co.	10.00	Licenses, taxes and fees					10.00	
31	Allamakee Journal	25.00	(Advertising and printing					13.00	
			(Stationery and supplies					12.00	
31	Minneapolis Blue Print Co.	1.28	Miscellaneous					1.28	
31	Commercial Engraving Co.	2.50	Stationery and supplies					2.50	
31	Iowa Multigraphing Co.	35.32	Advertising and printing					35.32	
31	Central States Printing Co.	20.17	Advertising and printing					20.17	
31	Charles Kerstein	51.00)							
31	Edw. Bench	14.15)	Approaches			65.15			
31	Western Union Telegraph Co.	3.94	Telephone and telegraph					3.94	
31	S. C. Jacobs	14.50	Furniture and fixtures					14.50	
31	V. Tausche Hdwe. Co.	61.70	(Toll House			15.00			
			(Furniture and fixtures					40.10	
			(Miscellaneous					6.50	
31	Spinner Bros.	3.60	Steel			3.60			
31	Railway Express Agency	1.63	Miscellaneous					1.63	
31	N. W. Bell Telephone Co.	7.35	Telephone and telegraph					7.35	
31	Leo Hurm	18.20	Approaches			18.20			
31	Gilbertson Schafer & Co.	1.85	Toll House			1.85			
31	Aschom Bros.	15.00	(Approaches			14.40			
			(Rent, light and heat					.60	
31	Spinner Bros.	1.00	Approaches			1.00			
31	Hess Bros.	96.00	Approaches			96.00			
31	Lansing Button Co.	12.44	Rent, light and heat					12.44	
31	Interstate Power Co.	43.02	Rent, light and heat					43.02	
	(Forward)	$417,142.40		$213,402.87	$ 96,044.98	$ 58,502.00	$ 7,624.81	$ 29,122.69	$12,445.05

Cash Disbursements (Cont'd)

Date	Paid To	Amount	Account Charged	To Phoenix Group	To Shaffer & Co. On Four Contracts	Other Construction Costs	To S. S. H. Co. on Account	Expenses, Furniture, Equipment, Etc.	To Stockholders
	(Brought forward)	$417,142.40		$213,402.87	$ 96,044.98	$ 58,502.00	$ 7,624.81	$ 29,122.69	$12,445.05
1932									
Jan. 5	Directors	27.00	Travel expense					27.00	
9	N. W. Bell Telephone Co.	12.80	Telephone and telegraph					12.80	
9	Maynard Stohr Printing Co.	6.00	Stationery and supplies					6.00	
13	Mrs. Buege	2.50	Salaries and wages					2.50	
14	James Cole	11.20	Maintenance					11.20	
14	Wm. Weis	4.02	Maintenance					4.02	
14	Wm. Nelson	1.75	Maintenance					1.75	
15	John Burke	42.50	Salaries and wages					42.50	
15	Geo. Gonyier	42.50	Salaries and wages					42.50	
15	Vance Thompson	60.00	Salaries and wages					60.00	
15	Oscar R. Thorson	200.00	Salaries and wages					200.00	
18	Ad. Long	11.20	Maintenance					11.20	
18	Wm. Nelson	9.80	Maintenance					9.80	
18	Wm. Weis	11.20	Maintenance					11.20	
18	James Cole	9.45	Maintenance					9.45	
18	B. H. Wellendorf	5.50	Miscellaneous expense					5.50	
18	Kehr Bros. Hdwe. Co.	45.35	(Tools and equipment					2.95	
			(Maintenance					2.70	
			(Advertising					4.26	
			(Miscellaneous expense					2.17	
			(Repairs					33.27	
28	N. W. Bell Telephone Co.	11.15	Telephone and telegraph					11.15	
29	N. W. Bell Telephone Co.	4.87	Rent, light and heat					4.87	
31	Oscar Thorson	200.00	Salaries and wages					200.00	
31	Geo. Gonyier	42.50	Salaries and wages					42.50	
31	John Burke	42.50	Salaries and wages					42.50	
31	Vance Thompson	74.85	(Salaries and wages					70.00	
			(Truck expense					3.85	
			(Tools					1.00	
28	P. E. Rethwisch	150.00	Toll House (via accounts payable)			150.00			
28	Hess Brothers	99.00	Maintenance					99.00	
Feb. 1	Postmaster – Lansing, Iowa	10.03	Postage					10.03	
2	Mrs. Buege	2.50	Salaries and wages					2.50	
3	Interstate Power Co.	36.05	Rent, light and heat					36.05	
5	Directors	12.00	Travel expense					12.00	
8	James Cole	4.03	Maintenance					4.03	
8	N. W. Bell Telephone Co.	18.70	Telephone and telegraph					18.70	
8	Western Union Telegraph Co.	.59	Telephone and telegraph					.59	
9	Leo Hurm	21.00	Maintenance					21.00	
12	Phoenix Finance Corp.	15.03	Postage					15.03	
13	Allamakee Journal	2.50	Advertising and signs					2.50	
15	Wm. Weis	4.38	Maintenance					4.38	
	(Forward)	$418,396.85		$213,402.87	$ 96,044.98	$ 58,652.00	$ 7,624.81	$ 30,227.14	$12,445.05

Cash Disbursements (Cont'd)

Date	Paid To	Amount	Account Charged	To Phoenix Group	To Shaffer & Co. On Four Contracts	Other Construction Costs	To S. S. H. Co. on Account	Expenses, Furniture, Equipment, Etc.	To Stockholders
1932	(Brought forward)	$418,396.85		$213,402.87	$ 96,044.98	$ 58,652.00	$ 7,624.81	$ 30,227.14	$12,445.05
Feb. 15	John Burke	35.17	Salaries and wages					35.17	
15	Geo. E. Gonyier	42.50	Salaries and wages					42.50	
15	Vance Thompson	60.00	Salaries and wages					60.00	
15	Henry Voegeli	57.11	(Taxes					57.06	
			(Miscellaneous					.05	
16	Postmaster, Lansing, Iowa	10.03	Postage					10.03	
19	Railway Express Agency	.58	Freight, express and cartage					.58	
20	C. C. Hoth	19.58	Taxes					19.58	
23	Maynard Stohr Printing Co.	2.25	Stationery and supplies					2.25	
23	Des Moines Blue Print Co.	1.95	Miscellaneous					1.95	
23	American Surety Co. of New York	20.00	Insurance and bonds					20.00	
23	C. O. Colbranson	.70	Repairs					.70	
23	Lansing Bulton Co.	15.80	Rent, light and heat					15.80	
23	Greenleys Electric Shop	3.50	Repairs					3.50	
23	Herman Olsen	1.50	Maintenance					1.50	
24	Wm. Weis	2.27	Maintenance					2.27	
24	James Cole	1.92	Maintenance					1.92	
24	Phoenix Finance Corp.	12.03	Postage					12.03	
23	Julius Reith Estate	50.00	Toll House (via accounts payable)		50.00				
23	P. E. Rethwisch	50.00	Approaches (via accounts payable)		50.00				
26	Railway Express Agency	1.33	Freight, express and cartage					1.33	
27	Elaine Cavanaugh	2.50	Salaries					2.50	
29	Hess Bros.	54.00	Maintenance					54.00	
29	Julius Reith Estate	84.77	Toll House $74.08, Appr. $10.69 (via accounts payable)		84.77				
29	Gilbertson Schafer & Co.	328.00	Approaches (via accounts payable)		328.00				
29	J. N. Gilbert	75.00	Engineering (via accounts payable)		75.00				
29	P. E. Rethwisch	69.25	Approaches $21.95, Toll H. $47.30 (via accounts payable)		69.25				
29	Oscar R Iverson	99.00	(Travel expense					93.94	
			(Telephone and telegraph					4.37	
			(Postage					.69	
29	Vance Thompson	74.38	(Truck expense					13.81	
			(Miscellaneous					.57	
								$0.00	

		(Brought forward)	$418,396.85		$213,402.87	$ 96,044.98	$ 58,652.00	$ 7,624.81	$ 30,227.14	$12,445.05
1932										
Feb.	15	John Burke	35.17	Salaries and wages					35.17	
	15	Geo. E. Gonyier	42.50	Salaries and wages					42.50	
	15	Vance Thompson	60.00	Salaries and wages					60.00	
	15	Henry Voegeli	57.11	(Taxes					57.06	
				(Miscellaneous					.05	
	16	Postmaster, Lansing, Iowa	10.03	Postage					10.03	
	19	Railway Express Agency	.58	Freight, express and cartage					.58	
	20	C. C. Hoth	19.58	Taxes					19.58	
	23	Maynard Stohr Printing Co.	2.25	Stationery and supplies					2.25	
	23	Des Moines Blue Print Co.	1.95	Miscellaneous					1.95	
	23	American Surety Co. of New York	20.00	Insurance and bonds					20.00	
	23	C. O. Colbranson	.70	Repairs					.70	
	23	Lansing Bulton Co.	15.80	Rent, light and heat					15.80	
	23	Greenleys Electric Shop	3.50	Repairs					3.50	
	23	Herman Olsen	1.50	Maintenance					1.50	
	24	Wm. Weis	2.27	Maintenance					2.27	
	24	James Cole	1.92	Maintenance					1.92	
	24	Phoenix Finance Corp.	12.03	Postage					12.03	
	23	Julius Reith Estate	50.00	Toll House (via accounts payable)			50.00			
	23	P. E. Rethwisch	50.00	Approaches (via accounts payable)			50.00			
	26	Railway Express Agency	1.33	Freight, express and cartage					1.33	
	27	Elaine Cavanaugh	2.50	Salaries					2.50	
	29	Hess Bros.	54.00	Maintenance					54.00	
	29	Julius Reith Estate	84.77	Toll House $74.08, Appr. $10.69 (via accounts payable)			84.77			
	29	Gilbertson Schafer & Co.	328.00	Approaches (via accounts payable)			328.00			
	29	J. N. Gilbert	75.00	Engineering (via accounts payable)			75.00			
	29	P. E. Rethwisch	69.25	Approaches $21.95, Toll H. $47.30 (via accounts payable)			69.25			
	29	Oscar R. Thorson	99.00	(Travel expense					93.94	
				(Telephone and telegraph					4.37	
				(Postage					.69	
	29	Vance Thompson	74.38	(Truck expense					13.81	
				(Miscellaneous					.57	
				(Salaries and wages					60.00	
	29	Geo. Gonyier	42.50	Salaries and wages					42.50	
	27	T. E. Gaudy	19.29	Fees					19.29	
	26	Ella Robbins	18.50	Fees					18.50	
	29	John Burke	42.50	Salaries and wages					42.50	
	29	Wm. Weis	11.03	Maintenance					11.03	
	29	N. W. Bell Telephone Co.	8.35	Telephone and telegraph					8.35	
	29	D. F. Wolf	5.00	Rent, light and heat					5.00	
	29	Leo Hurm	4.20	Maintenance					4.20	
	5	A. B. Wilder	27.00	Travel expense					27.00	
Mar.	2	Interstate Power Co.	29.24	(Rent, heat and light					26.44	
				(Repairs					2.80	
	5	The Dollar Press	16.25	(Miscellaneous					2.75	
				(Stationery and supplies					13.50	
	8	N. W. Bell Telephone Co.	8.35	Telephone and telegraph					8.35	
	8	James Cole	8.75	Maintenance					8.75	
	8	Frank Baumer	2.45	Maintenance					2.45	
	8	Wm. Weis	15.05	Maintenance					15.05	
	9	Mrs. Buege	2.63	Maintenance					2.63	
	9	Western Union Telegraph Co.	12.15	Telephone and telegraph					12.15	
		(Forward)	$419,845.21		$213,402.87	$ 96,044.98	$ 59,309.02	$ 7,624.81	$ 31,018.48	$12,445.05

Date	Paid To	Amount	Account Charged	To Phoenix Group	To Shaffer & Co. On Four Contracts	Other Construction Costs	To S. S. H. Co. on Account	Expenses, Furniture, Equipment, Etc.	To Stockholders
	(Brought forward)	$419,845.21		$213,402.87	$ 96,044.98	$ 59,309.02	$ 7,624.81	$ 31,018.48	$12,445.05
1932									
Mar. 10	W. S. Gault	4.50	(Stationery and supplies						
			(Travel expense					.50	
10	A. B. Wilder	54.00	Travel expense					4.00	
11	Iowa Multigraphing Co.	32.26	Miscellaneous					54.00	
11	Maynard Stohr Printing Co.	44.37	(Miscellaneous					32.26	
			(Postage					37.52	
			(Stationery and supplies					5.50	
11	Phoenix Finance Corp.	2.50	Stationery and supplies					1.35	
14	Phoenix Finance Corp.	20.06	Postage					2.50	
15	Oscar R. Thorson	100.00	Salaries and wages					20.06	
15	Geo. Gonyier	42.50	Salaries and wages					100.00	
15	John Burke	42.50	Salaries and wages					42.50	
15	Vance Thompson	60.00	Salaries and wages					42.50	
15	Oscar R. Thorson	100.00	Salaries and wages					60.00	
16	James Cole	.35	Maintenance					100.00	
16	Wm. Weis	.70	Maintenance					.35	
16	H. T. Wagner	24.75	Travel expense					.70	
19	Central Auto Market	25.00	Tools and equipment (Chev. Truck)					24.75	
21	James Cole	1.05	Maintenance					25.00	
21	Phoenix Finance Corp.	5.67	Insurance and bonds					1.05	
31	Wm. Weis	2.98	Maintenance					5.67	
31	James Cole	3.50	Maintenance					2.98	
31	N. W. Bell Telephone Co.	9.60	Telephone and telegraph					3.50	
31	Interstate Power Co.	34.77	(Rent, light and heat					9.60	
			(Repairs					30.52	
31	John Burke	42.50	Salaries and wages					4.25	
31	Geo. E. Gonyier	42.50	Salaries and wages					42.50	
31	Vance Thompson	86.34	(Salaries and wages					42.50	
			(Truck expense					60.00	
Apr. 4	Leo Hurm	9.45	Maintenance					26.34	
4	Wm. Nelson	3.15	Maintenance					9.45	
4	James Cole	4.37	Maintenance					3.15	
5	A. B. Wilder	2.00	Salaries and wages					4.37	
5	A. B. Wilder	27.00	Travel expense					2.00	
5	Geo. Huntley	12.60	Travel expense					27.00	
5	Oscar R. Thorson	50.00	Travel expense (via accounts payable)					12.60	
7	Western Union Telegraph Co.	1.38	Telephone and telegraph					50.00	
7	McNamara Office Sup. Co.	1.13	Stationery and supplies					1.38	
9	N. W. Bell Telephone Co.	4.15	Telephone and telegraph					1.13	
11	Oscar R. Thorson	50.00	(Accounts payable					4.15	
			(Travel expense (via accounts payable)					34.83	
12	Iowa-Des Moines Nat'l Bank	3.00	Rent, light and heat					15.17	
12	Wm. Nelson	.70	Maintenance					3.00	
12	James Cole	10.50	Maintenance					.70	
15	Wm. Weis	10.33	Maintenance					10.50	
15	Geo. E. Gonyier	42.50	Salaries and wages					10.33	
15	John Burke	42.50	Salaries and wages					42.50	
15	Vance Thompson	60.00	Salaries and wages					42.50	
15	Oscar R. Thorson	80.61	Travel expense					60.00	
16	Julius Boeckel	2.00	Miscellaneous					80.61	
23	James Cole	21.00	Maintenance					2.00	
								21.00	

Date		Paid To	Amount	Account Charged	To Phoenix Group	To Shaffer & Co. On Four Contracts	Other Construction Costs	To S. S. H. Co. on Account	Expenses, Furniture, Equipment, Etc.	To Stockholders
		(Brought forward)	$421,065 98		$213,402 87	$ 96,044 98	$ 59,309 02	$ 7,624 81	$ 32,239 25	$12,445 05
192										
Apr.	23	Frank Gonyier	2 00	Maintenance					2 00	
	23	Ad. Long	7 00	Maintenance					7 00	
	23	Wm. Weis	21 00	Maintenance					21 00	
	23	Bechtel Trust Co.	8 75	Freight, express and cartage					8 75	
	23	Oscar Thorson	50 00	Travel expense					50 00	
	27	Otto Mortzfield	21 00	Mainter nce					21 00	
	27	James Cole	21 00	Maintenance					21 00	
	27	Wm. Weis	24 85	Maintenance					24 85	
	27	Ad. Long	24 85	Maintenance					24 85	
	29	N. W. Bell Telephone Co.	4 45	Telephone and telegraph					4 45	
	30	Geo. E. Gonyier	42 50	Salaries and wages					42 50	
	30	John Burke	42 50	Salaries and wages					42 50	
	30	Oscar Thorson	100 00	Salaries and wages					100 00	
	30	Vance Thompson	72 88	(Truck and automobile expense					12 88	
				(Salaries and wages					60 00	
	30	Oscar Thorson	35 19	Travel expense					35 19	
	30	Phoenix Finance Corp.	25 00	Tools and equipment (Chev. Truck)					25 00	
	30	Oscar R. Thorson	600 00	Salaries (via account Payable $200 00)					600 00	
May	2	Interstate Power Co.	24 76	Rent, light and heat					24 76	
	3	N. W. Bell Telephone Co.	2 75	Telephone and telegraph					2 75	
	3	Mrs. Buege	50	Salaries and wages					50	
	3	Otto Mansfield	10 50	Maintenance					10 50	
	3	Wm. Weis	15 40	Maintenance					15 40	
	3	James Cole	17 15	Maintenance					17 15	
	3	Ad. Long	15 40	Maintenance					15 40	
	9	N. W. Bell Telephone Co.	5 05	Telephone and telegraph					5 05	
	9	Western Union Telegraph Co.	1 38	Telephone and telegraph					1 38	
	10	Kenlt Bros.	2 00	Maintenance					2 00	
	10	Leo Parm	5 60	Maintenance					5 60	
	11	Wm. Weis	16 27	Maintenance					16 27	
	11	Ad. Long	13 47	Maintenance					13 47	
	11	James Cole	16 27	Maintenance					16 27	
	11	Geo. E. Billings	90	Maintenance					90	
	14	Cobb, Hoke, Benson, Krause & Faeger	26 60	(Fees					25 00	
				(Telephone and telegraph					1 60	
	14	Standard Oil Co.	3 79	Truck expense					3 79	
	14	S. W. Metcalf	1 85	Miscellaneous					1 85	
	14	Lansing Button Co.	13 00	Rent, light and heat					13 00	
	14	City of Lansing	4 30	Rent, light and heat					4 30	
	14	Greenleys Electric Shop	3 24	Repairs					3 24	
	15	Allamakee Journal	11 50	Stationery and supplies					11 50	
	15	Geo. Gonyier	37 50	Salaries and wages					37 50	
	15	John Burke	37 50	Salaries and wages					37 50	
	15	Vance Thompson	60 00	Salaries and wages					60 00	
	14	A. B. Wilder	31 65	(Telephone and telegraph					6 65	
				(Travel expense					25 00	
	14	Iowa Multigraph Co.	19 90	Miscellaneous					19 90	
	14	Maynard Stohr Co.	5 50	Stationery and supplies					5 50	
	14	Sec'y. of State (Minn.)	1 00	Fees					1 00	
	15	Oscar R. Thorson	100 00	Salaries and wages					100 00	
	17	Postmaster, Lansing, Ia.	10 03	Postage					10 03	

Date		Paid To	Amount	Account Charged	To Phoenix Group	To Shaffer & Co. On Four Contracts	Other Construction Costs	To S. S. H. Co. on Account	Expenses, Furniture, Equipment, Etc.	To Stockholders
		(Brought forward)	$422,683.71		$213,402.87	$ 96,044.98	$ 59,309.02	$ 7,624.81	$ 33,856.98	$12,445.05
1932										
May	17	James Cole	6.82	Maintenance					6.82	
	17	Wm. Weis	10.32	Maintenance					10.32	
	24	Phoenix Finance Corp.	25.00	Tools and equipment (Chev. truck)					25.00	
	27	Wm. Weis	14.87	Maintenance					14.87	
	27	James Cole	2.10	Maintenance					2.10	
	31	N. W. Bell Telephone Co.	2.85	Telephone and telegraph					2.85	
	31	Carl Strub	1.50	Rent, light and heat					1.50	
	31	Wm. Nelson	14.00	Maintenance					14.00	
	31	Wm. Weis	19.95	Maintenance					19.95	
	31	John Burke	42.50	Salaries and wages					42.50	
	31	Geo. Gonyier	42.50	Salaries and wages					42.50	
	31	Vance Thompson	60.00	Salaries and wages					60.00	
	31	Oscar R. Thorson	300.00	Salaries and wages					300.00	
	27	Oscar R. Thorson	1.20	Telephone and telegraph					1.20	
	31	Chas. J. Hedwall Co.	69.67	Insurance (via accounts payable)					69.67	
June	3	Standard Oil Co.	2.51	Truck expense					2.51	
	3	Interstate Power Co.	34.66	Rent, light and heat					34.66	
	4	State of Wisconsin	200.00	Fees					200.00	
	4	State of Wisconsin	85.00	Fees					85.00	
	4	Leo Hurm	6.65	Maintenance					6.65	
	7	Wm. Weis	17.50	Maintenance					17.50	
	7	Herman Olson	1.00	Truck expense					1.00	
	7	Wm. Lantz	6.00	Rent, light and heat					6.00	
	7	Greenleys Electric Shop	.75	Repairs					.75	
	7	Shaffner Bros.	6.25	Maintenance					6.25	
	7	Western Union Telegraph Co.	1.08	Telephone and telegraph					1.08	
	8	N. W. Bell Telephone Co.	1.50	Telephone and telegraph					1.50	
	15	Wm. Weis	21.00	Maintenance					21.00	
	15	Ben. Mullarky	2.50	Maintenance					2.50	
	15	Geo. Gonyier	37.50	Salaries and wages					37.50	
	15	John Burke	37.50	Salaries and wages					37.50	
	15	Vance Thompson	60.00	Salaries and wages					60.00	
	16	Standard Oil Co.	15.58	Truck expense					15.58	
	16	S. & H. Chevrolet Co.	11.75	Truck expense					11.75	
	16	Willis and Moore	110.00	Insurance and bonds					110.00	
	20	Wm. Weis	21.00	Maintenance					21.00	
	18	Standard Oil Co.	89.70	Oil station purchases					89.70	
	22	C. O. Colbranson	1.00	Repairs					1.00	
	23	Standard Oil Co.	1.90	Truck expense					1.90	
	23	Phoenix Finance Corp.	25.00	Tools and equipment (Chev. truck)					25.00	
	25	N. W. Bell Telephone Co.	2.75	Telephone and telegraph					2.75	
	28	Wm. Weis	6.47	Maintenance					6.47	
	30	John Burke	37.50	Salaries and wages					37.50	
	30	Geo. E. Gonyier	37.50	Salaries and wages					37.50	
	30	Vance Thompson	60.00	Salaries and wages					60.00	
	30	Oscar Thorson	77.40	(Travel expense					73.07	
				(Stationery and supplies					1.50	
				(Postage					.18	
				(Maintenance					1.00	
				(Oil station expense					.60	
				(Truck expense					1.05	
		(Forward)	$424,315.94		$213,402.87	$ 96,044.98	$ 59,309.02	$ 7,624.81	$ 35,489.21	$12,445.05

Date		Paid To	Amount	Account Charged	To Phoenix Group	To Shaffer & Co. On Four Contracts	Other Construction Costs	To S. S. H. Co. on Account	Expenses, Furniture, Equipment, Etc.	To Stockholders
		(Brought forward)	$424,315 94		$213,402 87	$ 96,044 98	$ 59,309 02	$ 7,624 81	$ 35,480.21	$12,445 05
1932										
June	30	Bechtel Trust Co.	90 00	Interest					90.00	
	30	Oscar Thorson	46 61	(Travel expense					46 16	
				(Postage					.45	
	30	Peoples State Bank	02	Taxes					.02	
	30	Peoples State Bank	16	Taxes					.16	
	30	Oscar R. Thorson	400 00	Salaries and wages					400.00	
July	1	Standard Glass & Paint Co.	4 50	Repairs					4.50	
	1	Interstate Power Co.	28 90	Rent, light and heat					28.90	
	5	Wm. Weis	3 85	Maintenance					3.85	
	6	Phoenix Finance Corp.	16 03	Postage					16.03	
	8	Standard Oil Co.	18 43	Truck expense					18.43	
	8	N. W. Bell Telephone Co.	2 51	Telephone and telegraph					2.51	
	9	Maynard Stohr Printing Co.	5 65	Stationery and supplies					5.65	
	5	Interstate Power & Light Co.	1 80	Oil station expense					1 80	
	7	Oscar Thorson	3 00	Oil station expense					3 00	
	11	Wm. Weis	6 65	Maintenance					6 65	
	12	V. C. Sallander	1 00	Truck expense					1 00	
	12	Iowa Auto Market	7 41	(Truck expense					2 04	
				(Postage					.29	
				(Oil station expense					5 08	
	12	National Cash Register Co.	3 89	Stationery and supplies					3 89	
	12	Lesthe Hdwe. Co.	5 40	(Oil station expense					90	
				(Insurance and bonds					4 50	
	12	Wisconsin Highway Com.	10 00	Miscellaneous expense					10 00	
	12	Frank J. Sprinner	16 50	Truck expense					16 50	
	15	Geo. Gonyier	37 50	Salaries and wages					37 50	
	15	John Burke	37 50	Salaries and wages					37 50	
	15	Vance Thompson	60 00	Salaries and wages					60 00	
	15	Krause Clothing Co.	60 00	Expense (via accounts payable)					60 00	
	14	Ray Dodge Chevrolet Co.	3 30	Insurance and bonds					3 30	
	14	Ray Dodge Chevrolet Co.	6 42	Truck expense					6 42	
	18	Standard Oil Co.	63 70	Gas and Oil purchased					63 70	
	18	Wm. Weis	12 60	Maintenance					12 60	
	19	Oscar R. Thorson	200 00	Salaries and wages					200 00	
	22	Phoenix Finance Corp.	25 00	Tools and equipment (Chev. truck)					25.00	
	27	N. W. Bell Telephone Co.	2 75	Telephone and telegraph					2 75	
	27	Standard Oil Co.	57	Truck expense					57	
	27	Standard Oil Co.	5 52	Truck expense					5 52	
	27	Lansing Water Works	6 52	Rent, light and heat					6 52	
	27	Corporation Trust Co.	6 00	Stationery and supplies					6 00	
	28	Bechtel Trust Co.	222 00	Interest					222 00	
	30	John Burke	37 50	Salaries and wages					37 50	
	30	Geo. Gonyier	37 50	Salaries and wages					37 50	
	30	Vance Thompson	60 00	Salaries and wages					60 00	
	29	Secretary of State — Iowa	1 00	Licenses, taxes and fees					1 00	
	30	Oscar Thorson	200 00	Salaries and wages					200 00	
Aug.	1	Peoples State Bank	62	Taxes and oil station expense 6c					62	
	3	Wm. Weis	14 00	Maintenance					14 00	
	3	James Cole	9 80	Maintenance					9 80	
	1	Iowa Des Moines National Bank	50	Miscellaneous expenses					50	
	4	Western Union	3 77	Telephone and telegraph					3 77	
		(Forward)	$426.102 32		$213.402 87	$ 96.044 98	$ 59.309 02	$ 7.624 81	$ 37.275 59	$12.445 05

Date		Paid To	Amount	Account Charged	To Phoenix Group	To Shaffer & Co. On Four Contracts	Other Construction Costs	To S. S. H. Co. on Account	Expenses, Furniture, Equipment, Etc.	To Stockholders
		(Brought forward)	$426,102 32		$213,402.87	$ 96,044.98	$ 59,309.02	$ 7,624.81	$ 37,275.59	$12,445.05
1932										
Aug.	5	Phoenix Finance Corp.	3 00	Postage					3 00	
	3	Interstate Power Co..	24 38	Rent, light and heat					24 38	
	3	Interstate Power Co.	1 94	Oil station expense					1 94	
	3	Standard Oil Co.	96 30	Gas and Oil purchased					96 30	
	12	James Cole	7 00	Maintenance					7 00	
	12	Wm. Weis	9 62	Maintenance					9 62	
	15	Geo. E. Gonyier	37 50	Salaries and wages					37 50	
	15	John Burke	37 50	Salaries and wages					37 50	
	16	Vance Thompson	40 00	Salaries and wages					40 00	
	15	Oscai Thorson	150 00	Salaries and wages					150 00	
	15	H. T. Wagner	12 60	Travel expense					12 60	
	15	A. B. Wilder	27 00	Travel expense					27 00	
	15	H. Hachlen	24 46	Travel expense					24 46	
	15	D. F. Wolfe	24 22	Travel expense					24 22	
	15	F. J. Nachtivy	24 22	Travel expense					24 22	
	15	H. A. Schrenner	20 80	Travel expense					20 80	
	99	Phoenix Finance Corp.	25 00	Tools and equipment (Chev. truck)					25 00	
	22	Chas. J. Hedwall Co.	50 00	Insurance (via accounts payable)					50 00	
	22	Foote Bros. Gear & Mach. Co.	50 00	Tools and equipment (grader)					50 00	
	23	Wm. Weis	1 58	Maintenance					1 58	
	23	Standard Oil Co.	7 79	Truck expense					7 79	
	23	Postmaster, Lansing, Iowa	15 03	Postage					15 03	
	26	N. W. Bell Telephone Co.	2 75	Telephone and telegraph					2 75	
	27	Frank J. Spinner	32 20	Truck expense					32 20	
	23	Iowa State Highway Comm.	1 00	Stationery and supplies					1 00	
	23	Central Auto Market	50 60	Truck expense					50 00	
	27	Pioneer Rubber Stamp Co.	4 12	Stationery and supplies					4 12	
	29	Foote Bros. Gear and Mach. Co.	157 20	Tools and equipment (grader)					157 20	
	31	John Burke	42 50	Salaries and wages					42 50	
	31	Geo. Gonyier	42 50	Salaries and wages					42 50	
	31	Vance Thompson	40 00	Salaries and wages					40 00	
	31	Oscar R. Thorson	150 00	Salaries and wages					150 00	
	31	M. M. Dehli	2 08	Licenses, taxes and fees					2 08	
	31	Pratt Paper Co.	6 10	Miscellaneous expense					6 10	
	31	D. M. Clean Towel Service	1 25	Miscellaneous expense					1 25	
	31	C. O. Colbranson	1 40	Repairs					1 40	
	31	Wm. Weis	3 68	Maintenance					3 68	
	31	Peoples State Bank	66	Taxes and oil station expense 6c					66	
	31	Iowa Des Moines National Bank	12	Taxes					12	
	29	Corporation Trust Co.	50 00	Fees					50 00	
	31	Iowa Des Moines National Bank	1 00	Miscellaneous expense					1 00	
	29	Standard Oil Co.	82 42	Gas and oil purchased					82 42	
	31	Oscar Thorson	69 15	(Postage					21	
				(Travel expense					67 56	
				(Truck expense					52	
				(Advertising and signs					84	
Sept.	3	Interstate Power Co.	2 37	Oil station expense					2 37	
	3	Standard Oil Station	10 66	Truck expense					10 66	
			10 00	(Truck expense					9 50	
				(Telephone and telegraph					50	
		(Forward)	$427,555 40		$213,402 87	$ 96,044 98	$ 59,309 02	$ 7,624 81	$ 38,728 67	$12,445 05

Date		Paid To	Amount	Account Charged	To Phoenix Group	To Shaffer & Co. On Four Contracts	Other Construction Costs	To S. S. H. Co. on Account	Expenses, Furniture, Equipment, Etc.	To Stockholders
		(Brought forward)	$427,555.40		$213,402.87	$ 96,044.98	$ 59,309.02	$ 7,624.81	$ 38,728.67	$12,445.05
1932										
Sept.	3	Standard Oil Co.	.92	Truck Expense					.92	
	3	Standard Glass & Paint Co.	.61	Repairs					.61	
	3	V. C. Sellander	.75	Truck expense					.75	
	3	Interstate Power Co.	24.82	(Taxes					.72	
				(Rent, light and heat					24.10	
	3	Iowa Press Clipping Bureau	2.50	Miscellaneous expense					2.50	
	3	Waukon Republican	14.00	Advertising and signs					14.00	
	3	Schubert and Stevenson	100.00	Licenses, taxes and fees (via accounts payable)					100.00	
	6	Ad. Long	3.67	Maintenance					3.67	
	6	Wm. Weis	25.02	Maintenance					25.02	
	6	Chas. J. Hedwall Co.	50.00	Insurance (via accounts payable)					50.00	
	6	Kehr Bros.	12.86	(Maintenance					2.38	
				(Miscellaneous					1.05	
				(Repairs					8.08	
				(Tools and equipment					1.35	
	6	Gilbertson Shafer & Co.	21.09	Truck expense					21.09	
	8	Oscar Thorson	95.79	(Advertising					23.64	
				(Postage					.16	
				(Travel expense					32.16	
				(Truck expense					.68	
				(Furniture and fixtures					1.00	
				(Travel expense					37.76	
				(Truck expense					.39	
	8	Secretary of State of Iowa	88.00	Licenses, taxes and fees					88.00	
	8	Morn-Swan Co.	3.75	Stationery and supplies					3.75	
	8	Western Union Telegraph Co.	1.51	Telephone and telegraph					1.51	
	9	Phoenix Finance Corporation	4.00	Postage					4.00	
	9	Standard Oil Company	64.26	Gas and oil purchased					64.26	
	12	John W. Shaffer & Co.	22.00	Miscellaneous					22.00	
	13	Wm. Weis	19.95	Maintenance					19.95	
	13	Ad. Long	3.68	Maintenance					3.68	
	15	C. C. Hoth -- County Treasurer	19.57	Taxes					19.57	
	15	Oscar R. Thorson	150.00	Salaries and wages					150.00	
	15	Geo. E. Gonyier	42.50	Salaries and wages					42.50	
	15	John Burke	42.50	Salaries and wages					42.50	
	15	Vance Thompson	40.00	Salaries and wages					40.00	
	21	Wm. Weis	6.65	Maintenance					6.65	
	21	Phoenix Finance Corp.	25.00	Tools and equipment (Chev. truck)					25.00	
	26	Wm. Weis	6.30	Maintenance					6.30	
	26	N. W. Bell Telephone Co.	2.75	Telephone and telegraph					2.75	
	30	John Burke	42.50	Salaries and wages					42.50	
	28	Standard Oil Co.	85.05	Gas and oil purchased					85.05	
	30	Geo. E. Gonyier	42.50	Salaries and wages					42.50	
	30	Vance Thompson	40.17	Salaries and wages					40.17	
	30	Oscar R. Thorson	150.00	Salaries and wages					150.00	
	30	Bank	1.00	Miscellaneous					1.00	
	30	Bank	.04	Taxes					.04	
	30	Bank	.80	Taxes					.80	
	30	Bank	.06	Oil station expense					.06	
		(Forward)	$428,811.97		$213,402.87	$ 96,044.98	$ 59,309.02	$ 7,624.81	$ 39,985.24	$12,445.05

Cash Disbursements (Cont'd)

Date		Paid To	Amount	Account Charged	To Phoenix Group	To Shaffer & Co. On Four Contracts	Other Construction Costs	To S. S. H. Co. on Account	Expenses, Furniture, Equipment, Etc.	To Stockholders
		(Brought forward)	$428,811.97		$213,402.87	$ 96,044.98	$ 59,309.02	$ 7,624.81	$ 39,985.24	$12,445.05
1932										
Oct.	5	Standard Oil Co.	17.36	Truck expense					17.36	
	5	Iowa Press Clipping Bureau	1.00	Miscellaneous					1.00	
	5	Lansing Garage Co.	2.75	Truck expense					2.75	
	5	Greenleys Electric Shop	1.08	Repairs					1.08	
	7	Interstate Power Co.	28.26	Rent, light and heat					28.26	
	7	Western Union Telegraph Co.	.50	Telephone and telegraph					.50	
	7	N. W. Bell Telephone Co.	.40	Telephone and telegraph					.40	
	11	Oscar R. Thorson	74.10	(Travel expense					65.92	
				(Truck expense					8.18	
	13	Decorah Public Opinion	2.50	Miscellaneous expense					2.50	
	15	Interstate Power Co.	2.61	Oil station expense					2.61	
	15	George Gonyier	42.50	Salaries and wages					42.50	
	15	John J. Burke	42.50	Salaries and wages					42.50	
	15	Vance Thompson	50.00	Salaries and wages					50.00	
	15	Wm. Weis	12.07	Maintenance					12.07	
	15	Oscar R. Thorson	150.00	Salaries and wages					150.00	
	18	Hart & Hart	200.00	(Approaches			136.61			
				(Fees					20.80	
				(Interest					42.59	
	18	T. C. Fish Sign Service Co.	100.00	Advertising					100.00	
	19	Standard Oil Co.	48.19	Gas and oil purchased					48.19	
	21	Phoenix Finance Corp.	25.00	Tools and equipment (Chev. truck)					25.00	
	24	N. W. Bell Telephone Co.	2.75	Telephone and telegraph					2.75	
	29	Standard Oil Co.	1.02	Truck expense					1.02	
	29	Standard Oil Co.	8.70	Truck expense					8.70	
	25	Ray Dodge Chevrolet Co.	5.40	Truck expense					5.40	
	31	George E. Gonyier	42.50	Salaries and wages					42.50	
	31	John J. Burke	7.97	Salaries and wages					7.97	
	31	Vance Thompson	50.00	Salaries and wages					50.00	
	31	Oscar R. Thorson	150.00	Salaries and wages					150.00	
	31	Vance Thompson	6.65	Truck expense					6.65	
	31	Oscar R. Thorson	30.16	Travel expense					30.16	
	31	Bank	.36	Taxes					.36	
	31	Bank	.04	Oil station expense					.04	
	31	Bank	.14	Taxes					.14	
	31	Bank	1.00	Miscellaneous					1.00	
Nov.	2	Standard Oil Co.	65.47	Gas and oil purchased					65.47	
	3	Interstate Power Co.	31.78	(Rent, light and heat					30.70	
				(Repairs					1.08	

1937									
Oct.	5	Standard Oil Co.	17 36	Truck expense				17.36	
	5	Iowa Press Clipping Bureau	1 00	Miscellaneous				1.00	
	5	Lansing Garage Co.	2 75	Truck expense				2.75	
	5	Greenleys Electric Shop	1 08	Repairs				1.08	
	7	Interstate Power Co.	28 26	Rent, light and heat				28.26	
	7	Western Union Telegraph Co.	50	Telephone and telegraph				.50	
	7	N. W. Bell Telephone Co.	.40	Telephone and telegraph				.40	
	11	Oscar R. Thorson	74 10	(Travel expense				65.92	
				(Truck expense				8.18	
	13	Decorah Public Opinion	2 50	Miscellaneous expense				2.50	
	15	Interstate Power Co.	2 61	Oil station expense				2.61	
	15	George Gonyier	42 50	Salaries and wages				42.50	
	15	John J. Burke	42 50	Salaries and wages				42.50	
	15	Vance Thompson	50 00	Salaries and wages				50.00	
	15	Wm. Weis	12 07	Maintenance				12.07	
	15	Oscar R. Thorson	150 00	Salaries and wages				150.00	
	18	Hart & Hart	200 00	(Approaches		136.61			
				(Fees				20.80	
				(Interest				42.59	
	18	T. C. Fish Sign Service Co.	100 00	Advertising				100.00	
	19	Standard Oil Co.	48 19	Gas and oil purchased				48.19	
	21	Phoenix Finance Corp.	25 00	Tools and equipment (Chev. truck)				25.00	
	24	N. W. Bell Telephone Co.	2 75	Telephone and telegraph				2.75	
	29	Standard Oil Co.	1 02	Truck expense				1.02	
	29	Standard Oil Co.	8 70	Truck expense				8.70	
	25	Ray Dodge Chevrolet Co.	5 40	Truck expense				5.40	
	31	George E. Gonyier	42 50	Salaries and wages				42.50	
	31	John J. Burke	7 97	Salaries and wages				7.97	
	31	Vance Thompson	50 00	Salaries and wages				50.00	
	31	Oscar R. Thorson	150 00	Salaries and wages				150.00	
	31	Vance Thompson	6 65	Truck expense				6.65	
	31	Oscar R. Thorson	30 16	Travel expense				30.16	
	31	Bank	.38	Taxes				.36	
	31	Bank	.04	Oil station expense				.04	
	31	Bank	.14	Taxes				.14	
	31	Bank	1.00	Miscellaneous				1.00	
Nov.	2	Standard Oil Co.	65 47	Gas and oil purchased				65.47	
	3	Interstate Power Co.	31 78	(Rent, light and heat				30.70	
				(Repairs				1.08	
	7	City of Lansing	5 84	Rent, light and heat				5.84	
	7	Greenleys Electric Shop	1 08	Repairs				1.08	
	7	Western Union Telegraph Co.	3 65	(Telephone and telegraph				3.48	
				(Taxes				.17	
	8	N. W. Bell Telephone Co.	3 15	(Telephone and telegraph				2.80	
				(Taxes				.35	
	12	Phoenix Finance Corp.	5 00	Postage				5.00	
	14	Louis Fritz	1 40	Maintenance				1.40	
	15	George Gonyier	42 50	Salaries and wages				42.50	
	15	John Burke	42 50	Salaries and wages				42.50	
	15	Vance Thompson	50 00	Salaries and wages				50.00	
	15	Oscar Thorson	150 00	Salaries and wages				150.00	
	23	American Security Co. of New York	8 00	Insurance and bonds				8.00	
	25	Phoenix Finance Corp.	25 00	Tools and equipment (Chev. truck)				25.00	
	25	N. W. Bell Telephone Co.	3 75	(Telephone and telegraph				3.65	
				(Taxes				.10	
		(Forward)	$430,358.60		$213,402.87	$ 96,044.98	$ 59,445.63	$ 7,624.81	$ 41,395.26	$12,445.05

Date		Paid To	Amount	Account Charged	To Phoenix Group	To Shaffer & Co. On Four Contracts	Other Construction Costs	To S. S. H. Co. on Account	Expenses, Furniture, Equipment, Etc.	To Stockholders
		(Brought forward)	$430,358.60		$213,402.87	$ 96,044.98	$ 59,445.63	$ 7,624.81	$ 41,395.26	$12,445.05
1932										
Nov.	30	George E. Gonyier	34.00	Salaries and wages					34.00	
	30	John Burke	42.50	Salaries and wages					42.50	
	30	Vance Thompson	50.00	Salaries and wages					50.00	
	30	Oscar R. Thorson	150.00	Salaries and wages					150.00	
	29	Standard Oil Co.	82.95	Gas and oil purchased					82.95	
	30	Bank	.12	Taxes					.12	
Dec.	8	Pratt Paper Co.	3.25	Stationery and supplies					3.25	
	8	N. W. Bell Telephone Co.	1.20	Telephone and telegraph					1.20	
	9	Interstate Power Co.	34.40	(Rent, light and heat					32.02	
				(Oil station expense					2.38	
	10	Ray Dodge Chevrolet Co.	2.55	Truck expense					2.55	
	15	George Gonyier	42.50	Salaries and wages					42.50	
	15	John Burke	42.50	Salaries and wages					42.50	
	15	Vance Thompson	50.00	Salaries and wages					50.00	
	14	Phoenix Finance Corp.	3.00	Postage					3.00	
	15	Cobb, Hoke, Benson, Krause & Faeger	388.28	Taxes and fees (via accounts payable)					388.28	
	15	Brennan Brothers	100.00	Approaches (via accounts payable)			100.00			
	15	Lyle Sign Co.	177.63	Approaches (via accounts payable)			177.63			
	15	Gilbertson Schafer Co.	107.65	Maintenance					107.65	
	15	F. C. Fish Sign Co.	100.00	Advertising					100.00	
	15	Bradshaw, Schenk & Fowler	493.42	Note payable					493.42	
	15	Bechtel Trust Co.	120.00	Interest					120.00	
	15	Oscar R. Thorson	181.73	(Salaries and wages					150.00	
				(Travel expense					31.16	
				(Truck expense					.57	
	17	Bank	.34	Taxes					.34	
	17	Bank	.04	Taxes					.04	
	19	Interstate Power Co.	2.38	Oil station expense					2.38	
	19	James Cole	2.63	Maintenance					2.63	
	19	Wm. Weis	3.15	Maintenance					3.15	
	19	Leo Klein	1.75	Maintenance					1.75	
	21	Younker Bros. Travel Bureau	10.15	Travel expense					10.15	
	28	Vance Thompson	11.97	(Freight, express					.66	
				(Travel expense					11.31	
	28	Standard Oil Co.	5.14	(Gas and oil purchased					1.41	
				(Truck expense					3.73	
	31	George Gonyier	42.50	Salaries and wages					42.50	
	31	John Burke	42.50	Salaries and wages					42.50	
	31	Vance Thompson	51.91	(Freight and express					.66	
				(Salaries and wages					50.00	
				(Truck expense					1.25	
	31	Standard Oil Co.	61.17	Gas and oil purchased					61.17	
	31	H. J. Heinz Co.	14.00	Miscellaneous expense					14.00	
	31	Bank	.08	Taxes					.08	
	31	Bank	.10	Taxes					.10	
	31	Bank	.50	Miscellaneous expense					.50	
		(Forward)	$432,816.59		$213,402.87	$ 96,044.98	$ 59,723.26	$ 7,624.81	$ 43,575.62	$12,445.05

Cash Disbursements (Cont'd)

Date	Paid To	Amount	Account Charged	To Phoenix Group	To Shaffer & Co. On Four Contracts	Other Construction Costs	To S. S. H. Co. on Account	Expenses, Furniture, Equipment, Etc.	To Stockholders
	(Brought forward)	$432,816.59		$213,402.87	$ 96,044.98	$ 59,723.26	$ 7,624.81	$ 43,575.62	$12,445.05
1933									
Jan. 3	N. W. Bell Telephone Co.	7.80	Telephone and telegraph					7.80	
6	Interstate Power Co.	26.78	(Oil station expense					1.12	
			(Rent, light and heat					25.66	
7	N. W. Bell Telephone Co.	5.10	(Taxes					.50	
			(Telephone and telegraph					4.60	
9	Postmaster	15.03	Postage					15.03	
15	John Burke	42.50	Salaries and wages					42.50	
15	George Gonyier	42.50	Salaries and wages					42.50	
15	Vance Thompson	59.23	(Salaries and wages					50.00	
			(Travel and automobile					9.23	
15	Oscar R. Thorson	35.69	Salaries and wages					35.69	
18	Amer. Surety Co. of N. Y.	16.00	Insurance and bonds					16.00	
18	Lansing Button Co.	14.15	Rent, light and heat					14.15	
18	S. M. Johnson	2.12	Stationery and supplies					2.12	
18	City of Lansing	3.90	Rent, light and heat					3.90	
18	James Cole	1.05	Miscellaneous					1.05	
18	Leo Klein	.88	Miscellaneous					.88	
18	Lansing Garage	8.60	Truck expense					8.60	
18	Iowa Press Clipping Bureau	3.40	Miscellaneous					3.40	
18	Greenleys Electric Shop	4.48	Repairs					4.48	
18	Gilbertson Schafer Co.	1.80	Maintenance					1.80	
18	Maynard Stolz Ptg. Co.	23.20	Stationery and supplies					23.20	
19	Standard Oil Co.	32.65	Gas and oil purchased					32.65	
19	Crawford County, Wis.	3,125.51	Accounts payable (taxes)					3,125.51	
20	Phoenix Finance Corp.	4.75	Miscellaneous					4.75	
27	Bechtel Trust Co.	282.00	Interest					282.00	
27	N. W. Bell Telephone Co.	4.42	Telephone and telegraph					4.42	
27	Lansing Garage	4.90	Truck expense					4.90	
31	Geo. Gonyier	32.81	Salaries and wages					32.81	
31	John Burke	37.50	Salaries and wages					37.50	
31	Vance Thompson	57.80	(Salaries and wages					50.00	
			(Truck and automobile					7.80	
31	Vance Thompson	1.23	Maintenance					1.23	
31	Standard Oil Co.	58.48	Gas and oil purchased					58.48	
31	Oscar Thorson	115.51	(Travel expense					64.24	
			(Telephone and telegraph					1.27	
			(Salaries and wages					50.00	
								.44	

		(Brought forward)	$432,816.59		$213,402.87	$ 96,044.98	$ 59,723.26	$ 7,624.81	$ 43,575.62	$12,445.05
1933									
Jan.	3	N. W. Bell Telephone Co.	7.80	Telephone and telegraph					7.80	
	6	Interstate Power Co.	26.78	(Oil station expense					1.12	
				(Rent, light and heat					25.66	
	7	N. W. Bell Telephone Co.	5.10	(Taxes					.50	
				(Telephone and telegraph					4.60	
	9	Postmaster	15.03	Postage					15.03	
	15	John Burke	42.50	Salaries and wages					42.50	
	15	George Gonyier	42.50	Salaries and wages					42.50	
	15	Vance Thompson	59.23	(Salaries and wages					50.00	
				(Travel and automobile					9.23	
	15	Oscar R. Thorson	35.69	Salaries and wages					35.69	
	18	Amer. Surety Co. of N. Y.	16.00	Insurance and bonds					16.00	
	18	Lansing Button Co.	14.15	Rent, light and heat					14.15	
	18	S. M. Johnson	2.12	Stationery and supplies					2.12	
	18	City of Lansing	3.90	Rent, light and heat					3.90	
	18	James Cole	1.05	Miscellaneous					1.05	
	18	Leo Klein	.88	Miscellaneous					.88	
	18	Lansing Garage	8.60	Truck expense					8.60	
	18	Iowa Press Clipping Bureau	3.40	Miscellaneous					3.40	
	18	Greenleys Electric Shop	4.48	Repairs					4.48	
	18	Gilbertson Schafer Co.	1.80	Maintenance					1.80	
	18	Maynard Stohr Ptg. Co.	23.20	Stationery and supplies					23.20	
	19	Standard Oil Co.	32.65	Gas and oil purchased					32.65	
	19	Crawford County, Wis.	3,125.51	Accounts payable (taxes)					3,125.51	
	20	Phoenix Finance Corp.	4.75	Miscellaneous					4.75	
	27	Bechtel Trust Co.	282.00	Interest					282.00	
	27	N. W. Bell Telephone Co.	4.42	Telephone and telegraph					4.42	
	27	Lansing Garage	4.90	Truck expense					4.90	
	31	Geo. Gonyier	32.81	Salaries and wages					32.81	
	31	John Burke	37.50	Salaries and wages					37.50	
	31	Vance Thompson	57.80	(Salaries and wages					50.00	
				(Truck and automobile					7.80	
	31	Vance Thompson	1.23	Maintenance					1.23	
	31	Standard Oil Co.	58.48	Gas and oil purchased					58.48	
	31	Oscar Thorson	115.51	(Travel expense					64.24	
				(Telephone and telegraph					1.27	
				(Salaries and wages					50.00	
	31	Kermit Bros. Sav. Bank	.44	Taxes					.44	
	31	Iowa Des Moines National Bank	.48	Taxes					.48	
Feb.	3	Interstate Power Co.	27.88	Rent, light and heat					27.88	
	4	Old Dutch Carbon	.75	Stationery and supplies					.75	
	6	Koch Bros.	3.15	Stationery and supplies					3.15	
	6	Phoenix Finance Corp.	3.80	Postage					3.80	
	7	Bechtel Trust Co.	6,480.00	(Interest (via accounts payable)					6,182.50	
				(Interest					297.50	
	7	Bechtel Trust Co.	15.00	Taxes					15.00	
	7	Bechtel Trust Co.	401.00	Fees (via accounts payable)					401.00	
	7	Interstate Power Co.	1.03	Oil station expense					1.03	
	9	Bechtel Trust Co.	2,910.00	Interest (via accounts payable)					2,910.00	
	15	George Gonyier	37.50	Salaries and wages					37.50	
	15	John Burke	37.50	Salaries and wages					37.50	
	15	Vance Thompson	55.04	(Salaries and wages					50.00	
				(Truck and automobile					5.04	
	15	Oscar R. Thorson	50.00	Salaries					50.00	
	24	N. W. Bell Telephone Co.	4.35	(Taxes					.15	
				(Telephone and telegraph					4.20	
		(Forward)	$446,916.28		$213,402.87	$ 96,044.98	$ 59,723.26	$ 7,624.81	$ 57,675.31	$12,445.05

Date	Paid To	Amount	Account Charged	To Phoenix Group	To Shaffer & Co. On Four Contracts	Other Construction Costs	To S. S. H. Co. on Account	Expenses, Furniture, Equipment, Etc.	To Stockholders
	(Brought forward)	$446,916 28		$213,402 87	$ 96,044 98	$ 59,723 26	$ 7,624 81	$ 57,675 31	$12,445 05
1933									
Feb. 28	George Gonyier	37 50	Salaries and wages					37 50	
28	John Burke	37 50	Salaries and wages					37 50	
28	Vance Thompson	55 20	(Salaries and wages					50 00	
			(Truck expense					4 32	
			(Maintenance					88	
28	Standard Oil Co.	56 10	Gas and oil purchased					56 10	
28	Oscar R. Thorson	50 60	(Advertising and signs					60	
			(Salaries and wages					50 00	
28	Herndt Bros. Sav. Bank	34	Taxes					34	
28	Iowa Des Moines Nat'l. Bank	10	Taxes					10	
Mar. 3	Interstate Power Co.	11 71	(Rent, light and heat					10 68	
			(Oil station expense					1 03	
15	George Gonyier	37 50	Salaries and wages					37 50	
15	John Burke	37 50	Salaries and wages					37 50	
15	Vance Thompson	58 64	(Salaries and wages					50 00	
			(Truck expense					8 64	
15	Wm. Nelson	2 10	Maintenance					2 10	
15	Oscar R. Thorson	50 00	Salaries and wages					50 00	
18	Brennan Bros.	100 00	Approaches (via accounts payable)			100 00			
18	Shubert-Stevenson Co.	50 00	Fees (via accounts payable)					50 00	
18	Thompson & Co.	121 50	Traveling (via accounts payable)					121 50	
18	J. A. Thompson	46 54	Traveling (via accounts payable)					46 54	
18	Maynard Stohr Ptg. Co.	12 00	(Miscellaneous					3 75	
			(Stationery and supplies					8 25	
18	Greenleys Electric Shop	1 08	Repairs					1 08	
18	B. H. Wellendorf	4 00	Miscellaneous					4 00	
18	Lansing Button Co.	20 07	Rent, light and heat					20 07	
18	The Bridge Association	10 00	Miscellaneous					10 00	
22	Phoenix Finance Corp.	3 00	Postage					3 00	
22	State of Wisconsin	2 00	Fees					2 00	
24	N. W. Bell Telephone Co.	2 75	Telephone and telegraph					2 75	
24	Wm. Nelson	3 15	Maintenance					3 15	
27	Robert Lowe	2 80	Maintenance					2 80	
27	Wm. Weis	7 35	Maintenance					7 35	
27	James Cole	8 05	Maintenance					8 05	
30	Standard Oil Co.	56 22	Gas purchases					56 22	
31	George Gonyier	37 50	Salaries and wages					37 50	
31	John Burke	35 67	Salaries and wages					35 67	
31	Vance Thompson	55 76	(Salaries and wages					50 00	
			(Truck and automobile					5 76	
31	Oscar R. Thorson	80 31	(Salaries and wages					50 00	
			(Traveling expense					30 16	
			(Stationery and applies					15	
31	Bank debit	10	Taxes					10	
31	Bank debit	16	Taxes					16	
Apr. 1	Interstate Power Co.	12 91	(Oil station expense					1 03	
			(Rent, light and heat					11 88	
4	Wm. Nelson	2 45	Maintenance					2 45	
4	Robert Lowe	1 75	Maintenance					1 75	
4	James Cole	2 62	Maintenance					2 62	
4	Wm. Weis	7 35	Maintenance					7 35	
7	N. W. Bell Telephone Co.	1 40	(Telephone and telegraph					1 25	
			(Taxes					15	

Date		Paid To	Amount	Account Charged	To Phoenix Group	To Shaffer & Co. On Four Contracts	Other Construction Costs	To S. S. H. Co. on Account	Expenses, Furniture, Equipment, Etc.	To Stockholders
		(Brought forward)	$448,039 56		$213,402 87	$ 96,044 98	$ 59,823 26	$ 7,624 81	$ 58,698 59	$12,445 05
1933										
Apr.	10	A. B. Wilder	27 00	Travel expense					27 00	
	10	Wis. Highway Comm.	6 00	Miscellaneous					6 00	
	10	H. Hoeblen	21 50	Travel expense					21 50	
	15	Wm. Weis	22 40	Maintenance					22 40	
	15	James Cole	14 35	Maintenance					14 35	
	15	Wm. Nelson	17 15	Maintenance					17 15	
	15	John Burke	37 50	Salaries and wages					37 50	
	15	Kermit Fitschen	37 50	Salaries and wages					37 50	
	15	Vance Thompson	64 76	(Salaries and wages					50 00	
				(Travel					2 16	
				(Truck and automobile					12 60	
	15	Greenleys Electric Shop	4 54	Repairs					4 54	
	15	Iowa Press Clipping Bureau	3 00	Miscellaneous					3 00	
	15	Iowa Des Moines Nat'l. Bank	3 30	(Taxes					30	
				(Rent, light and heat					3 00	
	15	Oscar R. Thorson	50 00	Salaries and wages					50 00	
	15	City Clerk	2 47	Rent, light and heat					2 47	
	17	Ad. Long	5 77	Maintenance					5 77	
	17	Wm. Weis	11 72	Maintenance					11 72	
	21	N. W. Bell Telephone Co.	1 30	Telephone and telegraph and taxes					1 30	
	25	State Tax Dept.	60 50	Taxes					60 50	
	25	Sec'y. of State — Del.	2 00	Fees					2 00	
	25	N. W. Bell Telephone Co.	2 75	Telephone and telegraph					2 75	
	25	Wm. Weis	6 47	Maintenance					6 47	
	25	Wm. Nelson	2 10	Maintenance					2 10	
	25	Standard Oil Co.	38 50	Gas purchases					38 50	
	28	Standard Oil Co.	82 48	Gas purchases					82 48	
	30	Kermit Fitschen	37 50	Salaries and wages					37 50	
	30	John Burke	37 50	Salaries and wages					37 50	
	30	Vance Thompson	58 64	(Salaries and wages					50 00	
				(Truck expense					8 64	
	30	Oscar R. Thorson	66 81	(Salaries and wages					50 00	
				(Travel expense					16 81	
	30	Bank debts	.56	(Taxes					56	
	30	Bank debits	.30	Taxes					30	
May	9	Interstate Power Co.	25 59	(Oil station expense					1 13	
				(Rent, light and heat					24 46	
	8	Standard Oil Co.	21 86	Gas and oil purchases					21 86	
	13	Wm. Weis	1 40	Maintenance					1 40	
	15	John Burke	37 50	Salaries and wages					37 50	
	15	Kermit Fitschen	37 50	Salaries and wages					37 50	
	15	Vance Thompson	55 40	(Salaries and wages					50 00	
				(Maintenance					5 40	
	15	Oscar Thorson	50 00	Salaries and wages					50 00	
	25	N. W. Bell Telephone Co.	2 75	Telephone and telegraph					2 75	
	31	George Gonyier	37 50	Salaries and wages					37 50	
	31	John Burke	37 50	Salaries and wages					37 50	
	31	Vance Thompson	55 76	(Salaries and wages					50 00	
				(Maintenance					5 76	
	31	Oscar R. Thorson	50 00	Salaries and wages					50 00	
	31	Standard Oil Co.	32 10	Gas purchases					32 10	
	31	Bank debit	.18	Taxes					18	
	31	Bank debit	.30	Taxes					30	

Date		Paid To	Amount	Account Charged	Phoenix Group	On Four Contracts	Construction Costs	Co. on Account	Equipment, Etc.	To Stockholders
		(Brought forward)	$449,211.27		$213,402.87	$ 96,044.98	$ 59,823.26	$ 7,624.81	$ 59,870.30	$12,445.05
1933										
June	2	Postmaster	15.03	Postage					15.03	
	3	Phoenix Finance Corp.	4.00	Postage					4.00	
	5	C. M. Sommers	10.00	Fees					10.00	
	5	Collector of Internal Revenue	327.80	Taxes					327.80	
	5	Corporation Trust Co.	50.00	Rent, light and heat					50.00	
	5	Pratt Paper Co.	1.48	Stationery and supplies					1.48	
	5	S. M. Johnson	1.69	Stationery and supplies					1.69	
	5	H. A. Schremser	20.80	Travel					20.80	
	5	C. O. Colbranson	.65	Repairs					.65	
	5	Interstate Power Co.	22.22	(Oil station expense					1.03	
				(Rent, light and heat					21.19	
	5	H. T. Wagner	12.60	Travel expense					12.60	
	5	Geo. W. Huntley	12.60	Travel expense					12.60	
	12	Oscar R. Thorson	32.76	Travel and misc. expense $2.00					32.76	
	13	Lyle Signs, Inc.	100.00	Account Payable (appr. $70.00						
				Int. $30.00)			70.00		30.00	
	13	Gilbertson Schafer & Co.	30.16	(Maintenance					27.91	
				(Repairs					2.25	
	13	Ascom Bros.	4.01	Miscellaneous					4.01	
	15	John Burke	37.50	Salaries and wages					37.50	
	15	George Gonyier	37.50	Salaries and wages					37.50	
	15	Vance Thompson	55.40	(Salaries and wages					50.00	
				(Maintenance					5.40	
	15	Oscar R. Thorson	50.00	Salaries and wages					50.00	
	15	F. C. Fish Sign Co.	100.00	Advertising (via accounts payable)					100.00	
	16	Herman Olson	2.50	Repairs					2.50	
	16	John Bechtel	1.60	Maintenance					1.60	
	16	Standard Oil Co.	44.17	Gas purchases					44.17	
	19	James Cole	3.33	Maintenance					3.33	
	21	Standard Oil Co.	19.31	Gas purchases					19.31	
	19	State Tax Commission	100.00	Taxes					100.00	
	22	Phoenix Finance Corp.	14.28	(Postage					12.60	
				(Stationery and supplies					1.68	
	23	Phoenix Finance Corp.	15.03	Postage					15.03	
	26	Wm. Weis	10.50	Maintenance					10.50	
	26	James Cole	10.50	Maintenance					10.50	
	26	N. W. Bell Telephone Co.	2.75	Telephone and telegraph					2.75	
	27	Oscar R. Thorson	50.00	Salaries and wages					50.00	
	30	John Burke	37.50	Salaries and wages					37.50	
	30	George Gonyier	37.50	Salaries and wages					37.50	
	30	Vance Thompson	55.40	(Salaries and wages					50.00	
				(Maintenance					5.40	
	30	Standard Oil Co.	13.34	Gas purchases					13.34	
	30	Federal tax on checks	.70	Taxes					.70	
July	1	Interstate Power Co.	17.99	(Oil station expense					1.03	
				(Rent, light and heat					16.96	
	6	P. E. Rethwisch	16.95	Maintenance					16.95	
	6	Lansing garage	1.00	Maintenance					1.00	
	6	Kehr Bros.	3.75	Maintenance					3.75	
	6	City Clerk	2.87	Rent, Light and heat					2.87	
	6	Hoag Adv. Service	39.20	Advertising and signs					39.20	
	6	Tax Dept. — Del.	34.00	Taxes					34.00	
	6	Iowa Press Clipping Bureau	3.00	Miscellaneous					3.00	
	6	Iowa Multigraphing Co.	6.56	Miscellaneous					6.56	
		(Forward)	$450,681.20		$213,402.87	$ 96,044.98	$ 59,893.26	$ 7,624.81	$ 61,270.23	$12,445.05

Cash Disbursements (Cont'd)

Date		Paid To	Amount	Account Charged	To Phoenix Group	To Shaffer & Co. On Four Contracts	Other Construction Costs	To S. S. H. Co. on Account	Expenses, Furniture, Equipment, Etc.	To Stockholders
		(Brought forward)	$450,681.20		$213,402.87	$ 96,044.98	$ 59,893.26	$ 7,624.81	$ 61,270.23	$12,445.05
1933										
July	6	Thompson & Co.	243.00	Traveling (via accounts payable)					243.00	
	7	Iowa Des Moines Nat'l Bank	134.60	Lyle Acct. pay. (appr. $6.76, Signs $127.84)			6.76		127.84	
	7	Iowa Des Moines Nat'l Bank	10.00	Taxes					10.00	
	7	Oscar R. Thorson	25.00	Travel expense					25.00	
	10	N. W. Bell Telephone Co.	1.50	Telephone and telegraph and taxes $.15					1.50	
	10	W. S. Ganet	8.20	Travel					8.20	
	11	James Cole	10.50	Maintenance					10.50	
	11	Wm. Weis	13.65	Maintenance					13.65	
	11	Standard Oil Co.	39.60	Gas purchases					39.60	
	12	Bradshaw, Schenk & Fowler	11.80	(Telephone and telegraph					8.55	
				(Fees					3.25	
	12	Standard Glass & Paint Co.	4.85	Maintenance					4.85	
	12	Oscar R. Thorson	6.01	Travel expense (Stationery and supplies $.85)					6.01	
	14	Iowa Des Moines Nat'l Bank	15.78	Postage					15.78	
	15	George Gonyier	37.50	Salaries and wages					37.50	
	15	John Burke	37.50	Salaries and wages					37.50	
	15	Vance Thompson	55.40	(Salaries and wages					50.00	
				(Maintenance					5.40	
	15	Oscar R. Thorson	50.00	Salaries and wages					50.00	
	25	Mrs. Alex Miller	1.00	Fees					1.00	
	31	George Gonyier	37.50	Salaries and wages					37.50	
	31	John Burke	37.50	Salaries and wages					37.50	
	31	Vance Thompson	55.76	(Salaries and wages					50.00	
				(Maintenance					5.76	
	31	Oscar R. Thorson	50.00	Salaries and wages					50.00	
	31	Phoenix Finance Corp.	50.00	Salaries and wages					50.00	
	31	Bank debits	1.00	Taxes					1.00	
Aug.	3	Federal tax on checks	.04	Taxes					.04	
	10	Hoag Adv. Service	197.60	Advertising and signs					197.60	
	8	Interstate Power Co.	16.13	(Oil station expense					1.03	
				(Rent, light and heat					15.10	
	8	Lyle Signs, Inc.	7.53	Outdoor signs					7.53	
	8	Julius Keith Estate	21.58	(Maintenance					8.68	
				(Misc. expense					12.90	

July	6	Thompson & Co.	243 00	Traveling (via accounts payable)					243 00	
	7	Iowa Des Moines Nat'l Bank	134 60	Lyle Acct. pay. (appr. $6.76, Signs $127.84)		6 76			127 84	
	7	Iowa Des Moines Nat'l Bank	10 00	Taxes					10 00	
	7	Oscar R. Thorson	25 00	Travel expense					25 00	
	10	N. W. Bell Telephone Co.	1 50	Telephone and telegraph and taxes $.15					1 50	
	10	W. S. Ganet	8 20	Travel					8 20	
	11	James Cole	10 50	Maintenance					10 50	
	11	Wm. Weis	13 65	Maintenance					13 65	
	11	Standard Oil Co.	39 60	Gas purchases					39 60	
	12	Bradshaw, Schenk & Fowler	11 80	(Telephone and telegraph					8 55	
				(Fees					3 25	
	12	Standard Glass & Paint Co.	4 85	Maintenance					4 85	
	12	Oscar R. Thorson	6 01	Travel expense (Stationery and supplies $.85)					6 01	
	14	Iowa Des Moines Nat'l Bank	15 78	Postage					15 78	
	15	George Gonyier	37 50	Salaries and wages					37 50	
	15	John Burke	37 50	Salaries and wages					37 50	
	15	Vance Thompson	55 40	(Salaries and wages					50 00	
				(Maintenance					5 40	
	15	Oscar R. Thorson	50 00	Salaries and wages					50 00	
	25	Mrs. Alex Miller	1 00	Fees					1 00	
	31	George Gonyier	37 50	Salaries and wages					37 50	
	31	John Burke	37 50	Salaries and wages					37 50	
	31	Vance Thompson	55 76	(Salaries and wages					50 00	
				(Maintenance					5 76	
	31	Oscar R. Thorson	50 00	Salaries and wages					50 00	
	31	Phoenix Finance Corp.	50 00	Salaries and wages					50 00	
	31	Bank debits	1 00	Taxes					1 00	
Aug.	3	Federal tax on checks	04	Taxes					04	
	10	Hoag Adv. Service	197 60	Advertising and signs					197 60	
	8	Interstate Power Co.	16 13	(Oil station expense					1 03	
				(Rent, light and heat					15 10	
	8	Lyle Signs, Inc.	7 53	Outdoor signs					7 53	
	8	Julius Keith Estate	21 58	(Maintenance					8 68	
				(Misc. expense					12 90	
	8	Iowa Multigraphing Co.	3 00	Misc. expense					3 00	
	8	N. W. Bell Telephone Co.	3 00	Telephone and telegraph					3 00	
	8	Berkowitz Envelope Co.	1 95	Stationery and supplies					1 95	
	8	Iowa Multigraphing Co.	9 33	Miscellaneous expense					9 33	
	8	Gilbertson Schafer & Co.	148 60	(Outdoor signs					73 55	
				(Maintenance					75 05	
	9	H. T. Wagner	10 00	(Postage					6 94	
				(Miscellaneous expense					3 06	
	10	Tax Dept. — Delaware	3 00	Miscellaneous expense					3 00	
	14	Standard Oil Co.	105 70	Gas and oil purchases					105 70	
	15	George Gonyier	40 00	Salaries and wages					40 00	
	15	John Burke	40 00	Salaries and wages					40 00	
	21	Fish Sign Co.	100 00	Advertising (via accounts payable)					100 00	
	28	Collector of Internal Revenue	100 00	Taxes					100 00	
	30	George Gonyier	40 00	Salaries and wages					40 00	
	30	John Burke	40 00	Salaries and wages					40 00	
	28	Geo. W. Huntley	12 50	Travel expense					12 50	
	28	Frank C. Fish	12 50	Travel expense					12 50	
	28	H. T. Wagner	12 50	Travel expense					12 50	
		(Forward)	$452,543 81		$213,402 87	$ 96,044 98	$ 59,900 02	$ 7,624 81	$ 63,126 08	$12,445 05

Cash Disbursements (Cont'd)

ate	Paid To	Amount	Account Charged	To Phoenix Group	To Shaffer & Co. On Four Contracts	Other Construction Costs	To S. S. H. Co. on Account	Expenses, Furniture, Equipment, Etc.	To Stockholders
	(Brought forward)	$452,543.81		$213,402.87	$ 96,044.98	$ 59,900.02	$ 7,624.81	$ 63,126.08	$12,445.05
28	F. T. Hartman	12.50	Travel expense					12.50	
28	Harold Gannitz	37.50	Travel expense					35.50	
28	D. F. Wolfe	37.50	Travel expense					37.50	
28	A. B. Wilder	43.50	Travel expense					43.50	
28	H. Hachlin	11.50	Travel expense					11.50	
28	J. H. Thompson	60.00	Salaries and wages					60.00	
28	Helen Ingols	10.00	Salaries and wages					10.00	
29	H. T. Wagner	12.50	Travel expense					12.50	
29	G. W. Huntley	12.50	Travel expense					12.50	
30	Bank debits	.36	Taxes					.36	
5	N. W. Bell Telephone Co.	2.90	Telephone and telegraph					2.90	
5	J. F. Bechtel	4.00	Maintenance					4.00	
5	Interstate Power Co.	17.50	(Oil station expense					1.03	
			(Rent, light and heat					16.47	
5	Fish Sign Service	200.00	Advertising (account payable $100.00)					200.00	
5	American Lithographing Co.	50.00	Advertising					50.00	
5	H. T. Wagner	400.00	Fees					400.00	
5	Harold Gannitz	12.50	Travel expenses					12.50	
5	D. F. Wolfe	12.50	Travel expenses					12.50	
5	H. Hoehlen	11.50	Travel expenses					11.50	
16	John Burke	40.00	Salaries and wages					40.00	
16	George Gonyier	40.00	Salaries and wages					40.00	
18	Clerk of U. S. Dist. Court	7.50	Fees					7.50	
22	American Lithographing Co.	200.00	Advertising and signs					200.00	
22	A. H. Schubert	125.00	Licenses, taxes and fees (via accounts payable)					125.00	
22	J. C. Fish Sign Co.	300.00	Advertising and signs					300.00	
22	Helen Ingols	50.00	Misc. expenses					50.00	
25	Bank — debit	.58	Taxes					.58	
	Totals	$454,255.65		$213,402.87	$ 96,044.98	$ 59,900.02	$ 7,624.81	$ 64,837.92	$12,445.05

Filed in the District Court March 11, 1940.

[fol. 786] (Exhibit K.)

(Incorporated by reference in Phoenix Finance Corporation's Answer and Cross-Bill.)

Stock Purchase Agreement.

This agreement made and entered into in duplicate by and between John W. Schaffer & Company, a Minnesota Corporation, hereinafter referred to as "Seller", and Thompson & Co., an Iowa corporation, hereinafter referred to as "Buyer", witnesseth:

In consideration of One Dollar ($1.00) in hand paid and a purchase note bearing date of Nov. 26, 1930, for the principle sum of $224,000.00 and bearing interest at the rate of 8% per annum after March 1, 1931, payable by Thompson & Co. to John W. Shaffer & Company on demand, receipt of which note and One Dollar ($1.00) is hereby acknowledged by the Seller and in consideration of the premises it is agreed as follows:

The "Seller" hereby sells and the "Buyer" hereby buys 1400 shares Class "A" Preferred and 1800 shares Class "B" Common stock of the Iowa-Wisconsin Bridge Co. at purchase price of Seventy Dollars ($70.00) per share. Said shares are represented by certificates as follows:

Certificate No. N 775 for 750 shares Class "A"
Certificate No. N 776 for 650 shares Class "A"
Certificate No. N 776 for 650 shares Class "B"
Certificate No. N 775 for 1150 shares Class "B"

receipt of which certificates is hereby acknowledged by the Buyer.

The Seller warrants the transfer and conveyance of clear title to said shares and agrees to defend the Buyer against any and all claims of all persons whatsoever and to save and make the Buyer whole in event of any loss by reason of any fault in said title.

The Seller agrees to accept from the Buyer as creditable to said purchase note and to endorse on the back of said note upon the receipt of same any and all shares of stock hereby conveyed and purchased, whether Class "A" or Class "B", and at the same price paid herein, namely,

seventy Dollars ($70.00) for each and every share so tendered, said shares to be properly endorsed by the Buyer for transfer.

The Seller agrees that the Buyer may pay off and close out said purchase note at any time by paying it in full, either by cash or returning any of said shares at Seventy Dollars ($70.00) per share and/or by transfer and delivery to the Seller of any of the considerations taken in payment for said shares by Thompson & Co., said considerations to be creditable to said purchase note at the same price allowed upon the resale of said shares by Thompson & Co. without appreciation or depreciation or by any combination of any of said returned stock, considerations or cash, provided that the sum total of the values applied to said note as herein provided must equal the unpaid amount due on said purchase note.

It is agreed that other credits may be mutually agreed upon between the Buyer and Seller from time to time and that the unpaid balance on said note may properly be reduced by said credits as they may be endorsed thereon.

The Buyer agrees that the Seller may have at all times a first lien against the unsold shares herein conveyed for the [fol. 787] sum remaining unpaid on said purchase note.

Signed this 26 day of November, 1930, for and on behalf of the respective corporations' parties hereto by their duly authorized officers.

(Seller) JOHN W. SCHAFFER & COMPANY,
By John W. Shaffer, Pres.

Witness:
John W. Hartwig.

(Buyer) THOMPSON & CO.
By M. K. Thompson, Secy. Treas.

Witness:
.....

[fol. 788] (Mandate of the Circuit Court of Appeals, Eighth Circuit.)

United States of America—ss.:

The President of the United States of America,

(Seal)

To the Honorable the Judges of the District Court of the United States for the Northern District of Iowa—Greeting:

Whereas, lately in the District Court of the United States for the Northern District of Iowa, before you, or some of you in a cause between First Trust & Savings Bank, formerly named Bechtel Trust Company, and A. H. Schubert, as Trustees; and Phoenix Finance Corporation, Inc., Complainants, and Iowa-Wisconsin Bridge Company, a corporation, Defendant, and Fayette D. Kendrick, Warren G. Hayes, Anna W. Shuster, T. H. Bakewell, and Ernest W. Haverland, Interveners, No. 220, In Equity, wherein the decree of the said District Court in said cause, entered on the 1st day of December, A. D. 1936, was in the following words, viz.:

"The above entitled cause came before the Court on the first day of December, 1936, it being the first day of the December 1936 Term of this Court, for the filing of Opinion, ruling upon exceptions to the Master's Report, taking final submission of the cause upon the Master's Report and his advisory findings and the evidence in the cause, and the entry of a Final Decree.

On the 5th day of December, 1934, the cause being at issue and upon the trial docket, was referred to the Hon. James W. Kindig, as Master in Chancery to take the evidence in the cause and report findings of fact and conclusions of law. On the 10th day of March, 1936, the Master having taken all of the evidence in the cause, filed his report embodying his findings and conclusions, and thereafter exceptions were filed to said report by the First [fol. 789] Trust & Savings Bank formerly named Bechtel Trust Company, and A. H. Schubert, Trustees, and Phoenix Finance Corporation, plaintiffs, and by [defendand] and interveners. And on the 13th day of June, 1936, all

respective parties appearing by their counsel and by agreement of all parties all exceptions to the Master's Report were argued and submitted at the United States Court Room at Fort Dodge, in the Central Division of this District. And thereafter the Court received briefs from all counsel, examined and considered the Master's Report and also all evidence taken before the Master. And the Court now being fully advised in the premises, makes and enters the following rulings:

The exceptions of the plaintiffs, trustees, numbered one to eight inclusive, and of Phoenix Finance Corporation, numbered one to six inclusive, are overruled and exceptions are reserved to the respective plaintiffs. Defendant and interveners' exceptions numbered one, two, five and ten having been withdrawn, are not further noticed. Defendant and interveners' exceptions numbered three, four, six and seven are overruled, and exceptions reserved to the defendants and interveners. And defendant and interveners' exceptions numbered eight, nine and eleven are sustained, with exceptions reserved to all opposing parties.

The Court having ruled upon all exceptions, and allowed exceptions to all rulings, now takes final submission of the cause upon the Master's advisory report, findings and conclusions, and upon all evidence taken before the Master and upon depositions filed in the cause and introduced before and considered by the Master.

And the Court now being fully advised in the premises, it is Ordered, Adjudged and Decreed that the findings and conclusions of the Master, except as modified and amplified by additional findings, be adjudged as the findings and conclusions of the Court, with such additional findings and conclusions as are filed in the cause. That the mortgage and bonds in suit were fraudulently issued. That all bonds are without valid consideration, with the exception of the bonds aggregating $15,000., hereinafter specified.

[fol. 790] That the bill of the plaintiffs be dismissed as to the plaintiff, Phoenix Finance Corporation, and that the prayer of the bill be denied, except in so far as the Decree provides for the protection of the holders of said $15,000. in bonds. That foreclosure and sale of the mortgaged

property be denied, but that in lieu thereof all earnings and revenues of the Iowa-Wisconsin Bridge Company over and above such as may be [absoloutely] necessary to pay maintenance, operating expenses and taxes, be sequestered and impounded for the purpose of paying the following bonds with interest, to-wit, $4,000. in bonds, due Bradshaw, Schenk and Fowler, $6,000. in bonds, due Helmer N. Anderson, and $1,000. in bonds, due each of the following, Laura B. Baker, J. W. Dempsey, Lyle Sign Company, M. B. Stone, and Cobb, Hoke, Benson, Krause and Faegre, or their respective assigns. That the property be retained under receivership until these obligations, with interest, are fully paid either out of the revenues sequestered as aforesaid, or by other funds found and furnished by the Bridge Company.

Jurisdiction is hereby reserved to deal with all matters arising under the receivership and in connection with adjustment and payment of taxes and counsel fees.

It is further Ordered, Adjudged and Decreed that the entire costs in the case be taxed to the plaintiffs, First Trust & Savings Bank, formerly named Bechtel Trust Company, and A. H. Schubert, Trustees, and Phoenix Finance Corporation. To all of which the plaintiffs have duly excepted.

GEO. C. SCOTT,
United States District Judge."

as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Circuit Court of Appeals, Eighth Circuit, by virtue of an appeal agreeably to the act of Congress, in such case made and provided, fully and at large appears;

And Whereas, at the May term, in the year of our Lord one thousand nine hundred and thirty-eight, the said cause [fol. 791] came on to be heard before the said United States Circuit Court of Appeals on the transcript of record from the said District Court, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court, in this cause be, and the same is here-

by, affirmed with costs; and that the Iowa-Wisconsin Bridge Company, a corporation, Defendant, and Fayette D. Kendrick, Warren G. Hayes, Anna W. Schuster, T. H. Bakewell and Ernest W. Haverland, Interveners, have and recover against the First Trust and Savings Bank and A. H. Schubert, as Trustees, and Phoenix Finance Corporation, the sum of Twenty Dollars for their costs herein, to be collected in accordance with law.

August 11, 1938.

You, therefore, are hereby commanded that such proceedings be had in said Cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Charles E. Hughes, Chief Justice of the United States, the 3rd day of April, in the year of our Lord one thousand nine hundred and thirty-nine.

Costs of Appellees:

Attorney $20.00

$20.00

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

Filed in the District Court April 5, 1939.

[fol. 792] (Findings of Fact and Conclusions of Law of District Court.)

This cause came on for further and final hearing before the Court on the 11th day of March, 1940 at Sioux City, Iowa, by consent of the parties:

F. A. Ontjes and Wm. C. Green appearing as attorneys for the defendant, Iowa-Wisconsin Bridge Company, and for the interveners;

James R. Morford and Casper Schenk appearing as attorneys for Phoenix Finance Corporation, one of the complainants;

Said matter was heard upon the verified Supplemental and Ancillary Bill of defendant and amendment thereto on file in the above entitled cause, the exhibits and papers

referred to in said Supplemental and Ancillary Bill, and Answer of the complainant, Phoenix Finance Corporation, and the evidence adduced upon the trial:

Now after having heard counsel and due consideration, the Court makes the following findings of facts:

[fol. 793] One.

The above entitled action was commenced by the Bechtel Trust Company (now First Trust & Savings Bank), an Iowa corporation, and A. H. Schubert, a citizen of Wisconsin, as Trustees, complainants against the Iowa-Wisconsin Bridge Company, a Delaware corporation, defendant, on or about the 28th day of August 1933 for the foreclosure of an alleged bond issue and deed of trust of the Iowa-Wisconsin Bridge Company in the sum of $200,000.00. The bill alleged jurisdiction based on diversity of citizenship, the issuance by the Iowa-Wisconsin Bridge Company of $200,000.00 of bonds and mortgage deed of trust to secure the same covering all of its property, and alleged default in the payment of principal and interest on said bonds and taxes on the bridge company's property and acceleration of due date and authority of the trustees to sue under the terms of the trust deed and prayed among other things: (1) An accounting; that an account be taken of the bonds and interest coupons secured by said mortgage deed of trust and the amount due on said bonds for principal and interest or otherwise, and of the amounts expended or to be expended by complainants and that the Iowa-Wisconsin Bridge Company be decreed to pay the amount found due on such accounting, together with costs and expenditures, a short day to pay to be fixed by the Court, and that in default of such payment the mortgaged property be sold to satisfy the amount so found due and costs and that in case of such sale the Iowa-Wisconsin Bridge Company and all persons claiming by, through or under it be barred and foreclosed of all equity redemption; (2) a judgment and decree against the bridge company for the deficiency, if any; (3) an order for the appointment of a receiver and (4) general equitable relief.

[fol. 794] That on the 28th day of August 1933 an Answer was filed on the part of the Iowa-Wisconsin Bridge Com-

pany, admitting diverse citizenship of the parties and admitting the execution of a purported mortgage deed of trust and the issuance of purported bonds secured thereby but denying the validity of the bonds and mortgage deed of trust, alleging the belief of defendant that a large part of the bonds were improperly executed and delivered; alleged the belief that there was a good defense to all or part of complainant's claim; alleged conflicting interests of common directors of the bridge company and Phoenix Finance System, Inc. and denying complainant's right to the appointment of a receiver and prayed the protection of the Court.

That on the 28th day of September 1933 the Court on motion of the complainants appointed a receiver of all of the property of the Iowa-Wisconsin Bridge Company of every kind and took the same into legal custody and the Court then had full, complete and exclusive jurisdiction of the parties and subject matter of the action.

That on the 5th day of December, 1933 Fayette D. Kendrick, a stockholder of the Iowa-Wisconsin Bridge Company, and a citizen of Minnesota, with leave of court, filed a petition of intervention in behalf of the defendant, himself and all other stockholders similarly situated, alleging, as later amended, that all of the bonds and mortgage deed of trust were issued as a part of a fraudulent scheme, plan and conspiracy with intent to cheat and defraud the Iowa-Wisconsin Bridge Company and its stockholders out of their property; that the bonds and mortgage were fraudulent, without consideration, invalid and void, and were procured by John A. Thompson and his associates in conspiracy, officers and directors of the Phoenix Finance Cor-[fol. 795] poration and its predecessor, Phoenix Finance System, Inc., by dominating and controlling the bridge company and by acting as officers and directors of the latter and while occupying dual position as common directors of the Iowa-Wisconsin Bridge Company and of the Phoenix Finance Corporation; and that part of the aforesaid bonds were procured by the Phoenix Finance Corporation while fraudulently cancelling and exchanging Iowa-Wisconsin Bridge Company stock therefor in fraud of other stockholders; that none of the bonds had passed to inno-

cent purchasers for value without notice; that the said John A. Thompson and his associates in conspiracy were still in control of the defendant bridge company and that demand by interveners to obtain relief from or through said defendant would be unavailing.

That after the filing of the petition of intervention, which by order of court was permitted to stand as an answer in behalf of defendant, Iowa-Wisconsin Bridge Company, the intervener moved the court for permission to bring in the Phoenix Finance Corporation, holder and owner of 90% of the outstanding bonds, as a co-complainant with the trustees, and the Court so ordered, and the Circuit Court of Appeals of the Eighth Circuit in its opinion has determined that the Phoenix Finance Corporation thereby became an ancillary party in the cause of which the Court already had complete jurisdiction. And it has also been found by this Court that the whole proceeding in this cause was instigated and conducted by Phoenix Finance Corporation with counsel of its own selection.

On the 24th day of February 1934 the Phoenix Finance Corporation filed an Answer to the petition of intervention in substance on information and belief denying all the allegations thereof except averring that it was the owner and holder of bonds in large amount of the Iowa-Wisconsin Bridge Company.

[fol. 796] That on the 5th day of December 1934 this Court with the agreement of parties, entered an order of reference to a special master to hear all of the issues and to take the evidence and proofs according to law, to examine the questions in issue and to report from said evidence his findings of fact and conclusions of law in respect to all of the issues herein, to report his conclusions as to whether the evidence and pleadings entitled complainants or other parties herein to relief, or to any part thereof prayed for in their respective pleadings.

That this cause was accordingly heard before the Master and evidence taken and his report filed; and that after the filing of such report the Phoenix Finance Corporation filed elaborate exceptions to the Master's report, setting forth in detail all considerations claimed to have passed

from it to the bridge company and to form any basis or foundation or consideration for the bonds held by it of the Iowa-Wisconsin Bridge Company, and that this court on examination of such exceptions has found that no consideration existed for any of said bonds held by the Phoenix Finance Corporation and the Eighth Circuit Court of Appeals has held that any consideration claimed by the Phoenix Finance Corporation was more than offset by what is due the bridge company from the Phoenix Finance Corporation.

That after the ruling on exceptions of the Phoenix Finance Corporation by this Court a petition for rehearing and modification of decree on the part of Phoenix Finance Corporation to be permitted to have withheld from the adjudications various items was denied and the items and matters hereinafter mentioned were included in the adjudications.

Two.

The Court finds that notice of motion for leave to file [fol. 797] supplemental and ancillary bill in this cause dated September 11, 1939 was duly served on the complainant Phoenix Finance Corporation by service of said notice, with copy of said supplemental and ancillary bill attached, on Casper Schenk, resident agent of said corporation in the State of Iowa, and upon said Casper Schenk as attorney of record for said corporation, on the 12th day of September, 1939, for hearing of said motion on the 18th day of September, 1939, at 3 o'clock P. M., before this Court in the United States Court Room at Waterloo, Iowa.

Two-A.

That on the 18th day of September, 1939 at 3 o'clock P. M. said motion came on for hearing, and on said date an order was entered, this Court granting leave to the said defendant to file said supplemental and ancillary bill and thereafter, upon application and motion of the defendant for preliminary injunction, an order of preliminary injunction was made. That thereafter, by consent of parties, this cause was duly assigned for hearing before the Court on the 11th day of March, 1940 at 2 o'clock P. M., at Sioux City, Iowa.

Three.

That the above entitled cause was commenced by the Bechtel Trust Company (now First Trust & Savings Bank) and A. H. Schubert as trustees on an alleged deed of trust and bonds at the request and instigation of the complainant Phoenix-Finance Corporation against the Iowa-Wisconsin Bridge Company and that a receiver was appointed of all the property of the bridge company and that thereafter petitions of intervention were filed by the above named interveners with leave and by order of court to defend said action; and the Phoenix Finance Corporation made a [fol. 798] party complainant by order of court; and that said cause was heard and decree rendered as hereinafter set forth.

Four.

That the fourth finding of fact of preliminary injunction is eliminated. The Court finds that on the first day of December, 1936, the Court filed its opinion and Findings of Fact and final decree, which was entered of record.

Five.

That following the entry of the decree aforesaid the complainant Phoenix Finance Corporation filed a petition for rehearing and prayed in the alternative that the decree be modified so as to withhold from adjudication the question of the validity of the $50,000 mortgage dated March 10, 1931, by permitting Phoenix Finance Corporation to institute an action at law against the bridge company if it so desired, for money had and received and that there be reinvested in said Phoenix Finance Corporation 517 shares of "A" stock surrendered in exchange for bonds. That the petition for rehearing and for modification of the decree were denied.

Six.

That appeal from the said decree, orders, rulings and adjudication of this Court was taken to the Circuit Court of Appeals of the Eighth Circuit by the above-named complainants, where the same was affirmed. That petition for Writ of Certiorari to the Supreme Court of the United States was denied and the mandate of the Circuit Court

of Appeals was issued on the third day of April, 1939, and on the 6th day of April, 1939, was filed and entered in the office of the Clerk of this Court.

[fol. 799] Seven.

That the above entitled action was commenced about the 28th day of August, 1933. That a large number of depositions were taken which involved a great deal of time, very voluminous transcripts, hundreds of exhibits; the trial of this cause before the Master involved a number of weeks and at the said trial a large amount of additional oral testimony was taken; that the hearing before this Court on exceptions involved months of work and that the hearing before this Court to settle the record and of this cause before the Circuit Court of Appeals involved many weeks of additional work; that in said action various claims of the Phoenix Finance Corporation were fully heard and adjudicated; that to relitigate the matters determined, piecemeal or otherwise, would subject the bridge company to great expense and impair its credit and business to its irreparable injury.

Eight.

That notwithstanding the final adjudication and order of the District Court of the United States for the Northern District of Iowa, the complainant, Phoenix Finance Corporation is disregarding said adjudication and order, and for the purpose of attempting to invalidate and nullify the lawful decree and order of this Court and for the purpose of depriving the defendant of the fruits of said adjudication and for the purpose of harassing, vexing and annoying and destroying the business of the defendant, has commenced and is prosecuting and is about to prosecute in the State of Delaware numerous and divers suits and actions involving the same matters fully and finally determined by this Court, and has further and in contempt of this Court filed for record and recorded the $50,000 mortgage hereinbefore and hereinafter referred to held by this Court to be fraudulent and invalid.

[fol. 800] Nine.

That the Phoenix Finance Corporation has commenced and is prosecuting the following suits against the said defendant:

a. Said Phoenix Finance Corporation filed an action entitled Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware, versus the Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware in the Superior Court of the State of Delaware in and for New Castle County, being case No. 39 November Term 1936, the summons of said action being dated September 29, 1938, and the alleged cause of action being based on two certain alleged promissory notes, one of $2000 dated December 15, 1932 and one of $3125 dated January 20, 1933, which were involved in the above entitled cause and the adjudication thereof; that in this cause it was claimed that said notes and the alleged considerations thereof formed part of the consideration for the issuance of $20,100 of the bonds involved in this action. That this Court found that the said bonds were fraudulently issued and wholly without consideration and were more than offset by indebtedness of Phoenix Finance Corporation and its predecessor Phoenix Finance System, Inc. to this defendant, Iowa-Wisconsin Bridge Company. That in said cause in Delaware the defendant, Iowa-Wisconsin Bridge Company interposed the defense of res judicata and other defenses, such as want of consideration. That said cause was tried on the issue raised by the plea of res judicata, but has not yet been determined by the Delaware Court.

b. That on or about the 20th day of February 1939 the said Phoenix Finance Corporation commenced an action in the Court of Chancery of the State of Delaware in and for New Castle County entitled Phoenix Finance corporation, a corporation of the State of Delaware, plaintiff versus Iowa-Wisconsin Bridge Company, a corporation of the [fol. 801] State of Delaware, defendant, and caused subpoena to be issued therein and served on said defendant and filed bill of complaint on February 18th, 1939, asking to recover 517 shares of Class "A" stock of the Iowa-Wisconsin Bridge Company, which was surrendered and cancelled at the time said Phoenix Finance Corporation fraudulently procured the issuance of $60,500 of bonds involved in and as found in this action, and which stock this court and the Circuit Court of Appeals ordered, ad-

judged and found the said Phoenix Finance Corporation was not entitled to have reissued to it. That the defendant has answered in said cause, but that said cause has not been tried.

c. That the said Phoenix Finance Corporation has commenced an action in the Superior Court of Delaware in and for New Castle County entitled Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware versus the Iowa-Wisconsin Bridge Company duly organized and existing under the laws of the State of Delaware, being case No. 65 September Term 1939, and has caused summons to be issued against said Iowa-Wisconsin Bridge Company returnable at Wilmington, Delaware on the 18th day of September next to answer said Phoenix Finance Corporation of a plea of trespass on the case, etc.; that said summons was caused to be issued on the 22nd day of June, 1939, and served on the defendant. That the alleged cause of action in said suit is based upon an alleged promissory note of $500.00. dated December 31, 1932, an alleged promissory note for $12,110.19, dated July 7, 1933, an alleged claim for $15,000 for money claimed to have been lent and advanced by defendant to plaintiff in that case and upon alleged claim for $7000.00 claimed to have been for money due and payable from the defendant to the plaintiff in that case, Phoenix Finance Corporation, for interest and forbearance. That the said alleged promissory notes of $500.00 and $12,110.19 were involved in the above entitled cause and the adjudication thereof; that in this cause it [fol. 802] was claimed that said notes and the alleged considerations therefor formed part of the consideration for the issuance of $20,100 of bonds involved in this action. That this court found that the said bonds were fraudulently issued and wholly without consideration and were more than offset by indebtedness of Phoenix Finance Corporation and its predecessor, Phoenix Finance System, Inc. to this defendant, Iowa-Wisconsin Bridge Company. That as to the alleged claim for $15,000.00 this is a mere restatement of the alleged cause of action on the notes aforesaid stated in different form and in the alternative and the alleged claim for $7000.00 is merely a claim for interest on the notes aforesaid set forth in a different form and

in the alternative. That all of said alleged claims were involved in and adjudicated in the above-entitled cause in this Court.

d. That the said Phoenix Finance Corporation commenced another action in the Superior Court of Delaware in and for New Castle County entitled Phoenix Finance Corporation, a orporation duly organized and existing under the laws of the State of Delaware versus the Iowa-Wisconsin Bridge Company, duly organized and existing under the laws of the State of Delaware, being Case No. 64, September Term 1939, and caused summons to be issued against said Iowa-Wisconsin Bridge Company returnable at Wilmington, Delaware on the 18th day of September next to answer said Phoenix Finance Corporation of a plea "that it hold and keep with it the covenant between them made according to the force and effect of said articles of agreement between them. etc." That the said Phoenix Finance Corporation caused said summons to be issued on the 22d day of June, 1939, and caused the same to be served on the defendant. That the alleged cause of action in said suit is based on an alleged agreement claimed to have been entered into between Phoenix Finance System, Inc., John W. Shaffer and Company, and Iowa-Wisconsin Bridge [fol. 803] Company, dated November 10, 1930, under and by virtue of which said Phoenix Finance Corporation claims defendant became indebted to Phoenix Finance System, Inc. in the sum of $21,262.71, claims to be the assignee of said Phoenix Finance System, Inc. and claims the total sum of $50,000.00 for principal and interest; that attached to the declaration in said case is a copy of said purported agreement. That said agreement so referred to in said declaration and sued upon is the same agreement described and referred to by this Court in its finding of fact #24, appearing at pages 13, 14 and 15 of Exhibit B attached to the Supplemental and Ancillary Bill of Complaint, which the Court found to be without consideration, a fraud upon the bridge company, void and ultra vires.

e. That the said Phoenix Finance Corporation commenced another action in the Superior Court of Delaware

in and for New Castle County, entitled Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware versus the Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware, being case No. 79 September Term 1939, and caused summons to be issued against said Iowa-Wisconsin Bridge Company returnable at Wilmington, Delaware on the 18th day of September next to answer said Phoenix Finance Corporation of a plea of trespass on the case, etc. That said Phoenix Finance Corporation caused said summons to be issued on the 11th day of July, 1939 and served on the defendant. That the alleged cause of action in said suit is based on certain of the bonds which were involved in the above entitled action, to-wit: One series B Bond No. 93 in the face amount of $500.00; one Series B Bond No. 97 in the face amount of $500.00. That this Court in its final decree, adjudged and held that all bonds held by Phoenix Finance Corporation were invalid, fraudulent and issued without consideration, and that this Court found certain bonds [fol. 804] which had been issued to Helmer Anderson in the total amount of $7400.00 to be valid to the extent of $6000.00 only, and directed that said sum of $6000.00 be paid from income of the bridge company; that said Series B Bonds Nos. 93 and 97, upon which suit has been commenced in the State of Delaware as hereinbefore set forth, are portions of the $7400.00 of the bonds issued to Helmer Anderson and allowed in part by this Court as aforesaid.

That sixty/seventy-fourths (60/74) of the face value of said bonds with accrued interest to May 1, 1939, has been available since May 1, 1939, and will be paid to the lawful holder of said bonds by the Receiver of this Court on surrender of said bonds.

f. That all ultimate facts and issues involved and presented in each of the actions above referred to now pending in the courts of the State of Delaware and brought by the Phoenix Finance Corporation against the Iowa-Wisconsin Bridge Company and specified or referred to in the Supplemental and Ancillary Bill of Complaint as amended of the Iowa-Wisconsin Bridge Company, were within the issues involved and were fully considered and determined by the Trial Court in its original Final Decree

and order denying petition for re-hearing and for modification of decree, which Court Order and Decree were affirmed by the Circuit Court of Appeals of the Eighth Circuit.

Cause No. 159, September Term, 1939, in the Superior Court of the State of Delaware in and for New Castle County, involving alleged toll tickets, and defenses thereto, is excepted herefrom.

Ten.

That John A. Thompson, who was found by this Court in this case, as controlling the Phoenix Finance Corporation, while dominating and controlling the Bridge Company in a [fol. 805] fraudulent scheme, plan and conspiracy to cheat and defraud the bridge company and stockholders, asserted on the 8th day of July, 1939 that there never was any litigation between Phoenix and the bridge company; that the alleged indebtedness of the bridge company and the Phoenix could be properly presented and put down in the Delaware Courts; that there were six cases down there now that would be carried on through the Courts in the next few months; one all finished, except the decision of the Court, and five others to follow.

Eleven.

That said John A. Thompson on the 23rd day of November, 1938 wrote the stockholders of the Iowa-Wisconsin Bridge Company: "I am not asking you or any other man to help me or to help Phoenix; Phoenix does not need any help in its fight to maintain its creditor position. In the end the facts will all be proved in competent courts, I am not a bit disturbed about the final outcome," etc.

That on the 12th day of June, 1939, the said John A. Thompson, president of the Phoenix Finance Corporation wrote to a stockholder and director of the Iowa-Wisconsin Bridge Company:

"Now Phoenix claimed outright ownership of $97,000 and $60,500, or a total of $157,500 of Bridge bonds. The $60,500 were bonds received in connection with the retirement of 517 shares of preferred stock which was unquestionably owned and paid for by Phoenix, so if the bonds were no good, certainly the Bridge Company must return the 517 shares of preferred stock to Phoenix. A suit is now

pending in Delaware to enforce the Bridge Company to do that which it should in fairness and honesty do without a lawsuit, and there is not the slightest doubt that the Delaware Courts will make the Bridge Company make good on the $60,500 of bonds or return the 517 shares of [fol. 806] preferred stock. So while this lawsuit may have resulted in the elimination of the $60,500 of bonds as a bonded debt, that was not a gain of $60,500 to the Bridge Company by any means.

"As to the $97,000 worth of bonds, even if the mortgage deed of trust had been adjudicated and eliminated, and it is still shown that the Bridge Company owes the $97,000 for legitimate borrowings, it makes little difference whether the Bridge Company pays the debt by reason of a mortgage foreclosure or by way of a judgment and execution against the Bridge.

"We have to this point accounted for $22,400 of bonds in the hands of third parties, eliminated by legitimate retirement of the full amount owing thereon, and $157,500 worth of bonds, the collection of which has been temporarily stayed, making a total of $179,900 and leaving $20,100 yet to be accounted for.

"These $20,100 of bonds were pledged as collateral against Bridge Company notes for borrowed money, totaling $17,735.19. Suits are now pending on these notes in the Delaware courts, and there is not the slightest chance that they will not be collected, because here Phoenix will have opportunity to present its evidence, which was never done in any of the proceedings in Federal Court, and could not properly be done because Phoenix and The Bridge Company, both being Delaware Corporations, could not carry on as proper parties with adverse interests in a Federal Court proceeding, as you well know."

That all of said matters were involved in this cause and determined by this court's decisions.

Twelve.

That on June 2, 1939 the complainant, Phoenix Finance Corporation, caused to be recorded in the office of the County Recorder in Book L, Pages 625, 626 of Allamakee County, Iowa, and on the 18th day of May, 1939, caused to

[fol. 807] be recorded in the office of the Registrar of Deeds of Crawford County, Wisconsin, in Volume 153 page 293, an alleged mortgage of the Iowa-Wisconsin Bridge Company to the Phoenix Finance Sy tem, Inc., in the sum of $50,000 dated March 10, 1931, which this court in this cause found to be without consideration, fraudulent and void, issued as a part of a scheme, plan nd conspiracy to cheat and defraud the bridge company and its stockholders. That by the recording of said alleged mortgage said Phoenix Finance Corporation has wrongfully cast a cloud upon the title of the defendant to its property and has attempted to render null and void that portion of the findings and decree and order of this Court finally determining the invalidity of said mortgage.

Thirteen.

That the complainant Phoenix Finance Corporation as hereinbefore set forth is threatening to and unless restrained by this Court will proceed to institute and prosecute actions as aforesaid and will permit to remain on record the invalid $50,000 mortgage aforesaid; that unless said complainant Phoenix Finance Corporation is restrained by this Court as herein prayed the defendant will be deprived of the fruits and advantages of the judgment, decree and orders of this Court in this cause and said complainant will continue with vexatious suits in utter disregard thereof; that the acts of said Phoenix Finance Corporation will cast a cloud over defendant's title and franchise because of a multiplicity of vexatious suits brought and to be brought against defendant and it will be damaged in a way that cannot be repaired or estimated at common law, and from these threatened wrongs the defendant has no remedy at common law but the only remedy is in equity.

From the foregoing Findings of Fact the Court makes the following conclusions of law:

[fol. 808] 1. That all the issues and ultimate facts litigated or for which under the issues joined, opportunity was offered for litigation upon the trial under the original Bill of Complaint as amended, were adjudicated on the entry of the final judgment and decree in the original case and by the order denying the petition for re-hearing and in the alternative for modification of decree.

2. That all ultimate facts and issues involved and presented in each of the actions now pending in the State of Delaware was referred to in the Findings of Fact and brought by the Phoenix Finance Corporation against the Iowa-Wisconsin Bridge Company, were within the issues and involved in considering the validity of the issue of bonds, the legality of which was in controversy on the trial of the original case, and were adjudicated by the final decree entered in the original case, and the order denying the petition for re-hearing and in the alternative for a modification of the decree. Cause No. 159, September Term, 1939, in the Superior Court of the State of Delaware in and for New Castle County, involving alleged toll tickets and defenses thereto, is excepted herefrom.

3. That upon the showing and proofs contained in the Iowa-Wisconsin Bridge Company's supplemental and ancillary verified bill of complaint as amended and supporting papers verified and submitted therewith, and upon the evidence judicially noticed and submitted upon the trial, the Iowa-Wisconsin Bridge Company is entitled to a permanent injunction restraining the Phoenix Finance Corporation, its officers, agents, servants, employees and attorneys, and all those persons in active concert or participation with them who receive actual notice of the Order by personal service or otherwise, from instituting, prosecuting or continuing the prosecution of any and all actions in any court in the State of Delaware or elsewhere drawing in question any of the facts or issues presented in any of the [fol. 809] cases now pending in the State of Delaware, or drawing in question any of the ultimate facts and issues adjudicated by the final decree entered on the trial of the original case. And said Phoenix Finance Corporation, and its officers, agents, servants, employees and attorneys and all those acting by or through or for it or them and its successors and assignees, should be enjoined and restrained jointly and severally, from in any wise proceeding, conducting, or carrying forward, in any manner whatsoever, or causing, procuring, or suffering to be conducted or carried forward in any manner whatsoever, any and all stipulations, motions and proceedings in the following actions or suits heretofore brought, instituted and commenced by said Phoenix Finance Corporation, complainant herein, against

the above named Iowa-Wisconsin Bridge Company, defendant herein, in the Courts of the State of Delaware to-wit:

a. The action entitled Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware versus the Iowa-Wisconsin Bridge Company, a corporation organized and existing under the laws of the State of Delaware in and for New Castle County, being Case No. 39, November Term 1938, the summons of said action being dated September 29, 1938, and the alleged cause of action being based on two certain alleged promissory notes, one of $2000 dated December 15, 1932 and one of $3125 dated January 20, 1933;

b. An action in the Court of Chancery of the State of Delaware in and for New Castle County, entitled Phoenix Finance Corporation, a corporation of the State of Delaware, plaintiff versus Iowa-Wisconsin Bridge Company, a corporation of the State of Delaware, defendant, subpoena in which was issued and served on said defendant and bill of complaint filed February 18, 1939, asking to recover 517 shares of Class "A" stock of the Iowa-Wisconsin Bridge Company.

[fol. 810] c. An action in the Superior Court of Delaware in and for New Castle County entitled Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware versus the Iowa-Wisconsin Bridge Company, duly organized and existing under the laws of the State of Delaware, being Case No. 65, September Term 1939, summons in which was issued returnable at Wilmington, Delaware on the 18th day of September, 1939, which summons was caused to be issued on the 22d day of June, 1939, the cause being upon alleged promissory note of $500.00 dated December 31, 1932, and alleged promissory note of $12,110.19 dated July 7, 1933 and alleged claim for $15,000 for money claimed to have been lent and advanced by defendant and upon an alleged payment for $7000 claimed to have been for money due and payable from the defendant to the plaintiff in that case.

d. An action in the Superior Court of Delaware in and for New Castle County entitled Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware, versus the Iowa-Wiscon-

sin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware, being Case No. 64, September Term 1939, summons of which was returnable on the 18th day of September, 1939, which summons was issued on the 22d day of June, 1939, the alleged cause of action being based on an alleged agreement claimed to have been entered into between Phoenix Finance System, Inc., John W. Shaffer and Company, and Iowa-Wisconsin Bridge Company, dated November 10, 1930, under and by virtue of which said Iowa-Wisconsin Bridge Company is claimed to have become indebted to Phoenix Finance System, Inc., in the sum of $21,262.71, Phoenix Finance Corporation claiming to be the assignee of the Phoenix Finance System, Inc., and claiming the total sum of $50,000.00 for principal and interest.

e. A suit commenced in the Superior Court of Delaware in and for New Castle County, Delaware, entitled Phoenix [fol. 811] Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware versus the Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware, being Case No. 79, September Term 1939, summons of which was issued returnable on the 18th day of September, 1939, which summons was issued on the 11th day of July, 1939, the alleged cause of action in said suit being based upon one Series B Bond No. 93, in the face amount of $500.00, and one Series B bond No. 97 in the face amount of $500.

f. That said Phoenix Finance Corporation, its officers, agents, servants, employees and attorneys, and all those acting by or through or for them, and its successors and assignees jointly and severally, be commanded and ordered forthwith to satisfy, release and remove from the records of the Recorders' office of Allamakee County, Iowa, and from the records of the Registrar of Deeds of Crawford County, Wisconsin, that certain mortgage executed by Iowa-Wisconsin Bridge Company to Phoenix Finance System, Inc., dated March 10, 1931 covering the property and assets of Iowa-Wisconsin Bridge Company, which said mortgage was filed for record and recorded in the Office of the Recorder of said Allamakee County, Iowa on or about the 2nd day of June, 1939 and recorded in Book L, Pages 625, 626,

and which was recorded in the office of the Registrar of Deeds of Crawford County, Wisconsin, on the 18th day of May, 1939 and recorded in Volume 153, Page 293, and that they deliver the original of said mortgage and note secured thereby for cancellation to the Clerk of this Court.

That the Phoenix Finance Corporation, its officers, attorneys, agents and employees be and are restrained and enjoined from commencing any action or actions calling in question the issues or facts adjudicated in this cause.

That the bond on preliminary injunction be and is hereby [fol. 812] exonerated and the Clerk of this Court be and he is hereby directed to return to the Receiver appointed by this Court the sum deposited by said Receiver with the Clerk under said Order for bond.

The foregoing conclusions of law are made by this Court this 11th day of March, 1940.

Let judgment and decree be entered accordingly.

Dated March 23, 1940.

GEO. C. SCOTT,
United States District Judge.

Filed in the District Court March 23, 1940.

[fol. 813] (Opinion of District Court.)

This case arises upon a supplemental and ancillary complaint filed by the Iowa-Wisconsin Bridge Company against Phoenix Finance Corporation, to enjoin the prosecution of a multiplicity of harassing suits in the Courts of the State of Delaware brought upon alleged causes of action already fully adjudicated by the decree of this Court. The principle upon which the ancillary complaint was permitted was the right and judicial power of this Court to protect the integrity and fruits of its own decree notwithstanding § 379, Title 28, of the United States Code. For citation of cases, see Note 8 under said section, page 204 permanent volume, page 36, 1939 pocket part.

A detailed history of the matters litigated and adjudicated by the original final decree of this Court will be found in the opinion of this Court reported in 19 Federal Supple-

ment 127, under title Bechtel Trust Co., et al., vs. Iowa-Wisconsin Bridge Co., et al., and the opinion of the Circuit Court of Appeals of the Eighth Circuit affirming the *decree of this Court and its subsequent ruling denying a re*hearing and a modification of the decree, found in 98 Federal Reporter (2d) 416, under title First Trust and Savings Bank, et al., vs. Iowa-Wisconsin Bridge Co., et al., and [fol. 814] the order of the Supreme Court of the United States denying the writ of certiorari found in 305 United States Reports 650, under title Phoenix Finance Corp. vs. Iowa-Wisconsin Bridge Co., et al.

When the original case was instituted Phoenix Finance Corporation was not a party, but later under the order of the court was brought in and joined as a party plaintiff. Sometime after final decree Phoenix Finance Corporation, the present respondent, filed a petition for re-hearing and alternatively for a modification of the decree. That petition was heard and submitted and denied. Thereafter the plaintiffs, including Phoenix Finance Corporation, perfected their appeal to the Circuit Court of Appeals for the Eighth Circuit. One of the grounds urged for re-hearing by Phoenix Finance Corporation was that jurisdiction of this court had been ousted when it became a party plaintiff because such joinder had destroyed the diversity of citizenship. This court held that Phoenix Finance Corporation was a dispensable party plaintiff because its rights and interests were fully represented by the trustees and had been fully adjudicated by the final decree, and that so far as jurisdiction was concerned Phoenix Finance Corporation was a formal or nominal party only.

The court is now confronted by a contention upon the part of Phoenix that seems to this Court amazingly inconsistent. The contention is that because this court and the Circuit Court of Appeals held Phoenix a dispensable party, therefore Phoenix was not bound by the final decree and may now litigate in other cou ts issues fully adjudicated by this court by the original judgment and rulings. The contention seems to entirely overlook the reason for holding Phoenix to be a dispensable party, viz., that its rights [fol. 815] and interests were already fully represented on the record and had been fully adjudicated.

Counsel for the bridge company has submitted proposed findings of fact and conclusions of law, and the Court having examined the same finds them to ~~be fully~~ sustained by the record, and the Court adopts the proposed findings as well as the proposed conclusions of law and they are ordered filed in the case and made part of the record, and decree will be entered for the Iowa-Wisconsin Bridge Company on the supplemental complaint.

Dated this 23rd day of March, 1940.

GEO. C. SCOTT,
United States District Judge.

Filed in the District Court March 23, 1940.

[fol. 816] (Final Decree, March 23, 1940.)

In The District Court of the United States in and for the Northern District of Iowa, Eastern Division.

First Trust & Savings Bank (formerly Bechtel Trust Company) and A. H. Schubert, as Trustees, and Phoenix Finance Corporation, Complainants,

vs. In Equity #220.

Iowa-Wisconsin Bridge Company, a corporation, Defendant,

Fayette D. Kendrick, Warren G. Hayes, Anna E. Schuster, T. H. Bakewell and Ernest W. Haverland, Interveners.

This cause came on for further and final hearing before the Court on the 11th day of March, 1940 at Sioux City, Iowa by consent of the parties—

F. A. Ontjes and Wm. C. Green appearing as attorneys for the defendant, Iowa-Wisconsin Bridge Company, and for the interveners;

James R. Morford and Casper Schenk appearing as attorneys for Phoenix Finance Corporation, one of the complainants;

And the Court having filed Findings of Fact and Conclusions of Law herein, for the reasons set forth in said Findings of Fact and Conclusions of Law.

It is hereby Ordered, Adjudged and Decreed that the complainant Phoenix Finance Corporation, its officers, agents, servants, employees and attorneys, be and they are hereby permanently enjoined and restrained in any wise from prosecuting, conducting or carrying forward in any manner whatsoever any and all of the matters, things and questions joined in the actions of law and equity instituted [fol. 817] by the Phoenix Finance Corporation against the Iowa-Wisconsin Bridge Company in the State of Delaware, to-wit:

a. The action entitled Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware versus the Iowa-Wisconsin Bridge Company, a corporation organized and existing under the laws of the State of Delaware in and for New Castle County, being Case No. 39, November Term 1938, the summons of said action being dated September 29, 1938, and the alleged cause of action being based on two certain alleged promissory notes, one of $2000 dated December 15, 1932 and one of $3125 dated January 20, 1933;

b. An action in the Court of Chancery of the State of Delaware in and for New Castle County, entitled Phoenix Finance Corporation, a corporation of the state of Delaware, plaintiff versus Iowa-Wisconsin Bridge Company, a corporation of the State of Delaware, defendant, subpoena in which was issued and served on said defendant and bill of complaint filed February 18, 1939, asking to recover 517 shares of Class "A" stock of the Iowa-Wisconsin Bridge Company;

c. An action in the Superior Court of Delaware in and for New Castle County entitled Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware versus the Iowa-Wisconsin Bridge Company, duly organized and existing under the laws of the State of Delaware, being case No. 65, September Term 1939, summons in which was issued returnable at Wilmington, Delaware on the 18th day of September 1939, which summons was caused to be issued on the 22nd day of June 1939, the cause being upon alleged promissory note of $500.00, dated December 31st, 1932, and alleged promissory note of $12,110.19 dated July 7, 1933 and alleged claim for

$15,000.00 for money claimed to have been lent and advanced by complainant and upon an alleged payment for $7000.00 claimed to have been for money due and payable from the defendant to the plaintiff in that case;

[fol. 818] d. An action in the Superior Court of Delaware in and for New Castle County entitled Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware versus the Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware, being Case No. 64, September Term, 1939, summons of which was returnable on the 18th day of September 1939, which summons was issued on the 22nd day of June 1939, the alleged cause of action being based on an alleged agreement claimed to have been entered into between Phoenix Finance System, Inc., John W. Schaffer & Company and Iowa-Wisconsin Bridge Company, dated November 10, 1930, under and by virtue of which said Iowa-Wisconsin Bridge Company is claimed to have become indebted to Phoenix Finance System, Inc., in the sum of $21,262.71, Phoenix Finance Corporation claiming to be the assignee of the Phoenix Finance System, Inc. and claiming the total sum of $50,000.00 for principal and interest.

e. A suit commenced in the Superior Court of Delaware in and for New Castle County, Delaware, entitled Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware versus the Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware, being Case No. 79, September Term 1939, summons of which was issued returnable on the 18th day of September 1939, which summons was issued on the 11th day of July 1939, the alleged cause of action in said suit being based upon one Series B bond No. 93 in the face amount of $500.00, and one Series B bond No. 97 in the face amount of $500.00.

f. That said Phoenix Finance Corporation, its officers, agents, servants, attorneys and employees and all those acting by or through or for them and its successors and assignees, jointly and severally are commanded and ordered [fol. 819] forthwith to satisfy, release and remove from the

records of the Recorder's office of Allamakee County, Iowa, and from the records of the Registrar of Deeds of Crawford County, Wisconsin, that certain mortgage executed by Iowa-Wisconsin Bridge Company to Phoenix Finance System, Inc., dated March 10, 1931 covering the property and assets of Iowa-Wisconsin Bridge Company, which said mortgage was filed for record and recorded in the office of the Recorder of said Allamakee County, Iowa, on or about the 2nd day of June, 1939 and recorded in Book L, pages 625, 626, and which was recorded in the office of the Registrar of Deeds of Crawford County, Wisconsin, on the 18th day of May 1939, and recorded in Volume 153 page 293, and that they deliver the original of said mortgage and note secured thereby for cancellation to the Clerk of this Court.

And the said Phoenix Finance Corporation, its officers, agents, servants, employees and attorneys are hereby directed and commanded to forthwith dismiss the aforesaid cases at the cost of the Phoenix Finance Corporation.

And the said Phoenix Finance Corporation, its officers, agents, servants, employees and attorneys are hereby permanently enjoined and restrained from commencing, prosecuting, or bringing in question, or in any manner carrying forward any suits or causes of action involved in or determined in the Findings of Fact and Conclusions and Final Decree dated December 1st, 1936 and order denying petition for rehearing and modification of decree filed in this cause on March 4, 1937.

That the entire costs in this case on Supplemental and Ancillary Bill be taxed to complainant, Phoenix Finance Corporation.

Dated this 23 day of March A. D. 1940, at Sioux City, Iowa, to be entered of record in the Eastern Division.

GEO. C. SCOTT,
United States District Judge.

Filed in the District Court March 23, 1940.

[fol. 820] (Notice of Appeal).

In the District Court of the United States In and For the Northern District of Iowa, Eastern Division.

First Trust & Savings Bank (formerly Bechtel Trust Company) and A. H. Schubert, as Trustees, and Phoenix Finance Corporation, Complainants,

No. 220. vs. In Equity.

Iowa-Wisconsin Bridge Company, a corporation, Defendant,

Fayette D. Kendrick, Warren G. Hayes, Anna W. Schuster, T. H. Bakewell and Ernest W. Haverland, Interveners,

* * * * * * *

Iowa-Wisconsin Bridge Company, a corporation, Complainant,

No. 220. vs. In Equity.

Phoenix Finance Corporation, Defendant.

Supplemental and Ancillary Bill of Complaint as amended.

Notice is hereby given that Phoenix Finance Corporation, a corporation of the State of Delaware, the defendant to the supplemental and ancillary bill of complaint as amended of Iowa-Wisconsin Bridge Company in the above stated cause, appeals to the United States Circuit Court of Appeals for the Eighth Circuit from the decree of the Honorable George C. Scott, Judge of the United States District Court for the Northern District of Iowa, Eastern Division, entered in said cause upon said supplemental and ancillary bill of complaint as amended, on the 23rd day of March, A. D. 1940.

JAMES R. MORFORD,
Address: Delaware Trust Building
Wilmington, Delaware.

CASPER SCHENK,
Address: Des Moines Building,
Des Moines, Iowa.

HAROLD W. NORMAN,
Address: Harris Trust Building,
Chicago, Illinois.
Attorneys for Appellant,
Phoenix Finance Corporation.

Filed in the District Court April 1, 1940.

[fol. 821] (Note by the Clerk of the District Court: Pursuant to Rule 73 (b) of the Federal Rules of Civil Procedure, copy of the foregoing Notice of Appeal was mailed on April 1, 1940, to F. A. Ontjes, Mason City, Iowa; and W. C. Green, St. Paul, Minnesota, attorneys for Iowa-Wisconsin Bridge Company; and notation of such mailing was entered in the civil docket.)

[fol. 822] (Supersedeas Bond on Appeal.)

Know All Men By These Presents:

That we, Phoenix Finance Corporation, a corporation of the State of Delaware, as Principal, and United States Fidelity and Guaranty Company, a corporation of the State of Maryland, as Surety, acknowledge ourselves to be jointly and severally indebted to Iowa-Wisconsin Bridge Company, a corporation of the State of Delaware, in the above cause, in the sum of Twenty Thousand Dollars ($20,000.00), to the payment of which well and truly to be made, we bind ourselves, our legal representatives, successors and assigns, jointly and severally, firmly by these presents.

Signed, sealed and dated this 30th day of March, A. D. 1940.

Whereas, on the 23rd day of March, A. D. 1940, in the District Court of the United States, in and for the Northern District of Iowa, Eastern Division, in a suit depending in that Court, wherein First Trust & Savings Bank (Formerly Bechtel Trust Company) a corporation and A. H. Schubert, as Trustees, and Phoenix Finance Corporation, a corporation as aforesaid, were original complainants, and Iowa-Wisconsin Bridge Company, a corporation as aforesaid, was original defendant, and wherein by supplemental and ancillary bill of complaint, the said Iowa-Wisconsin Bridge Company is complainant, and the said Phoenix Finance Corporation is defendant, numbered on the Equity Docket as No. 220, a decree was rendered against the said Phoenix Finance Corporation, a corporation as [fol. 823] aforesaid, from which said decree, Phoenix Finance Corporation, a corporation as aforesaid, has filed a notice of appeal in the Office of the Clerk of said District

Court as aforesaid, thereby prosecuting its appeal to the Circuit Court of Appeals for the Eighth Circuit to reverse said decree.

Now the condition of the above obligation is such that if the said Phoenix Finance Corporation, a corporation as aforesaid, shall prosecute its appeal to final effect and satisfy the judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and satisfy in full such modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award, if it fails to make good its plea, then the above obligation to be void; otherwise to remain in full force and virtue.

PHOENIX FINANCE CORPORATION,
By D. E. Renshaw, Vice President.
Attest: (Seal)
M. K. Thompson, Secretary.

UNITED STATES FIDELITY AND GUARANTY COMPANY, (Seal)
By Mona Roesner, Attorney-in-fact.

Approved: April 8, 1940. As per order this day signed.

GEO. C. SCOTT,
Judge.

Filed in the District Court April 9, 1940.

[fol. 824] Order Granting Stay and Approving Supersedeas Bond.)

On this 8th day of April, 1940, it appearing to the Court that Phoenix Finance Corporation, one of the complainants in the original proceeding in this cause and the defendant to the supplemental and ancillary bill of complaint of Iowa-Wisconsin Bridge Company, has filed notice of appeal pursuant to Rule 73 of the Rules of Civil Procedure for the District Courts of the United States from the decree of this Court dated March 23, 1940, that Phoenix Finance Corporation has applied to this Court for a suspension and stay of said decree pending appeal, and that the said Phoe-

[fol. 825] nix Finance Corporation has presented to the Court a supersedeas bond in the penal sum of Twenty Thousand Dollars ($20,000) with United States Fidelity & Guaranty Company, a corporation of the State of Maryland, as surety thereon.

It is now, therefore, Ordered that the appeal of Phoenix Finance Corporation in this cause shall operate to suspend and stay fulfillment of the decree of this Court dated March 23, 1940, only as respects the cancellation and release of the $50,000., mortgage referred to in paragraph "f" of the Final Decree appealed from, and such suspension and stay to be conditioned upon the Phoenix Finance Corporation executing in proper form under its corporate seal, a full release and acquittance of such mortgage deed and delivering such release and acquittance together with such mortgage and note or notes purported to be secured thereby, to the Clerk of this Court within the next thirty days, to be and to be considered impounded with said Clerk until the determination of said appeal, and in case said Decree is affirmed, all of such impounded papers to be delivered to the Iowa-Wisconsin Bridge Company for the proper recording of such release and cancellation of said mortgage and note or notes. But if said Decree appealed from is reversed, then such release and impounded papers to abide the decision and procedendo of the Circuit Court of Appeals of the Eighth Circuit. In all other respects the permanent injunction granted to remain in full force and effect.

It is further Ordered that the supersedeas bond in the form, in the amount and with the surety as presented to this Court be and the same is hereby approved.

Done and Ordered the day and year above written, at Sioux City, Iowa, to be entered of record in the Eastern Division.

GEO. C. SCOTT,
United States District Judge.

Filed in the District Court April 8, 1940.

[fol. 826] Designation by Defendant-Appellant of Contents of Record on Appeal Pursuant to Rule 75 of Rules of Civil Procedure.)

Phoenix Finance Corporation, the defendant named in the Supplemental and Ancillary Bill of Complaint as amended of Iowa-Wisconsin Bridge Company and the appellant herein, by James R. Morford, Harold W. Norman and Casper Schenk, its attorneys, hereby designates the following portions of the record, proceedings and evidence on said supplemental and ancillary bill as amended, to be contained in the record on appeal:

1. Copy of all docket entries.

2. Motion of Iowa-Wisconsin Bridge Company for leave to file supplemental and ancillary bill of complaint.

3. Order granting leave to Iowa-Wisconsin Bridge Company to file supplemental and ancillary bill of complaint.

4. Supplemental and ancillary bill of complaint of Iowa-Wisconsin Bridge Company as a single document incorporating the amendment thereto but omitting all exhibits. Add notation to the effect that exhibits A, B, C, D and E are to be found in the printed record on appeal to the Circuit Court of Appeals in the foreclosure proceedings in this cause beginning at printed record pages as follows: Exhibit A—p. 156; Exhibit B—p. 179; Exhibit C—p. 202; Exhibit D— p. 411; and Exhibit E—p. 1689; that exhibits F, G and H are the writs of summons only in certain Delaware cases mentioned in the supplemental and ancillary bill and are included with the complete exemplification of the records of said cases in Defendant's Exhibits SC-103, SC-104 and SC-105 respectively, said exhibits being hereinafter designated as part of this record on appeal (Item 35); and that Exhibit I and the cause of action therein mentioned (the Bridge toll ticket case) are not involved in the decree from which this appeal is taken. (Note: The Court is asked judicially to notice the printed record on appeal in said foreclosure proceedings. Additional copies of said printed record will be filed with the Clerk of the Circuit Court of Appeals for the Eighth Circuit and will be made available to the Judges thereof at the argument on this appeal.)

5. Motion of Iowa-Wisconsin Bridge Company for preliminary injunction.

6. Resistance of Phoenix Finance Corporation to application and motion of Iowa-Wisconsin Bridge Company for preliminary injunction omitting exhibits. Add notation to the effect that Exhibits 7(c), 7(d) and 7(e) appear as part of defendant's Exhibits SC-103, SC-104 and SC-105, said exhibits being hereinafter designated as part of this [fol. 827] record on appeal and that Exhibit 7(f) and the cause of action therein mentioned are not involved in the decree from which this appeal is taken.

7. Order of September 28, 1939 at hearing on motion for preliminary injunction and resistance thereto; granting leave to Iowa-Wisconsin Bridge Company to file amendment to supplemental and ancillary bill of complaint and ordering Phoenix Finance Corporation to file its answer within ten days.

8. Findings of fact and conclusions of law dated October 7, 1939 on application and motion of Iowa-Wisconsin Bridge Company for preliminary injunction.

9. Order of October 7, 1939 for preliminary injunction.

10 Order of October 7, 1939 requiring Receiver of Iowa-Wisconsin Bridge Company to deposit $2,000 to secure the condition of the preliminary injunction bond.

11. Motion of Phoenix Finance Corporation for appointment of auditor, with verified statement of George E. Preuss attached thereto.

12. Motion of Phoenix Finance Corporation to amend order of October 7, 1939, for preliminary injunction.

13. Order of November 6, 1939 amending order of October 7, 1939 for preliminary injunction.

14. Order of November 7, 1939 denying motion of Phoenix Finance Corporation for appointment of an auditor.

15. Answer and counterclaim of Phoenix Finance Corporation.

16. Motion of Iowa-Wisconsin Bridge Company to strike answer and counterclaim of Phoenix Finance Corporation.

17. Order of December 18, 1939 striking portions of the answer and counterclaim of Phoenix Finance Corporation.

18. Notice of Phoenix Finance Corporation of intention to take depositions in compliance with Rule 5 of the United States District Court for the Northern District of Iowa.

19. Notice of Phoenix Finance Corporation of the time and place for the taking of the depositions of George E. Preuss, Edgar S. Gage and Lee J. Skoner. (Note: With respect to this designation, incorporate in the record the notice for the taking of said depositions in Chicago, Illinois on January 29, 1940 and add a notation to the effect that a similar notice fixing February 29, 1940 as the date for the taking of said depositions at the same place and before the same Notary had theretofore been served and filed, giving date of service and filing.)

[fol. 828] 20. Motion of Iowa-Wisconsin Bridge Company (a) to strike from the files notice filed by Phoenix Finance Corporation of intention to take depositions, (b) for an order that the depositions of the parties therein specified be not taken, (c) for an order that the depositions of George E. Preuss, Edgar S. Gage and Lee J. Skoner be not taken pursuant to the notice of Phoenix Finance Corporation, and (d) to set and proceed with the hearing on permanent injunction.

21. Motion and application of Iowa-Wisconsin Bridge Company that depositions be not taken until further order of Court.

22. Further motion of Iowa-Wisconsin Bridge Company for an order that depositions be not taken with respect to the notice of Phoenix Finance Corporation for the taking of said depositions on January 29, 1940.

23. Order of January 25, 1940 that the depositions of George E. Preuss, Edgar S. Gage and Lee J. Skoner be not taken until Court has ruled upon pending motions and then only if Court rules said depositions may be taken.

24. Resistance of Phoenix Finance Corporation to the foregoing motions of Iowa-Wisconsin Bridge Company with all schedules of testimony and exhibits thereto, and including inter alia the report of special examination of the

accounts of Iowa-Wisconsin Bridge Company entitled "Receipts and Disbursements, Iowa-Wisconsin Bridge Company, Lansing, Iowa, November 1, 1930 to September 25, 1933" as prepared by Ernst & Ernst, Accountants and Auditors, under date of January 17, 1940, which said exhibit is filed with said resistance as a separate document but is referred to therein as an exhibit thereto.

25. Order of February 6, 1940 that depositions of George E. Preuss, Edgar S. Gage and Lee J. Skoner be not taken.

26. Notice of Phoenix Finance Corporation of the time and place for the taking of the deposition of John A. Thompson.

27. Notice of Phoenix Finance Corporation of the time and place for the taking of the deposition of Albert Penn.

28. Motion of Iowa-Wisconsin Bridge Company for an order that the depositions of John A. Thompson and Albert Penn be not taken.

29. Application of Iowa-Wisconsin Bridge Company for an order that the depositions of John A. Thompson and Albert Penn be not taken until the further order of Court.

[fol. 829] 30. Order of February 14, 1940 that depositions of John A. Thompson and Albert Penn be not taken until Court has ruled upon pending motion and then only if Court rules said depositions may be taken.

31. Resistance of Phoenix Finance Corporation to motion of Iowa-Wisconsin Bridge Company for order that depositions of John A. Thompson and Albert Penn be not taken.

32. Order of March 5, 1940 that depositions of John A. Thompson and Albert Penn be not taken.

33. Reporter's stenographic transcript (two copies filed herewith) of proceedings on final hearing at Sioux City, Iowa, on March 11, 1940.

34. Complainant's Exhibit SC-6 with notation showing that the same instrument was admitted in evidence as Complainant's Exhibit SC-7, and that said last mentioned

exhibit shows the recording of said instrument in Crawford County, Wisconsin, giving date of recording and record reference.

35. Defendant's Exhibits SC-101, SC-102, SC-103, SC-104 and SC-105.

36. Defendant's Exhibits SC-106, SC-107, SC-108, SC-109, SC-112, SC-113, and those portions only of Defendant's Exhibits SC-110 and SC-111 representing stenographic transcripts of statements made by John A. Thompson at the stockholders' meetings of Iowa-Wisconsin Bridge Company of July 8, 1939 and December 6, 1938 respectively, all of said exhibits being offered in evidence on behalf of Phoenix Finance Corporation, objected to by counsel for Iowa-Wisconsin Bridge Company and rejected as evidence by rulings of the District Court. Add notation that Defendant's Exhibit SC-114 is the report of a special examination of the accounts of Iowa-Wisconsin Bridge Company made by Ernst and Ernst, Accountants and Auditors, and is the same document that is an exhibit to the Resistance of Phoenix Finance Corporation to the motions of Iowa-Wisconsin Bridge Company that the depositions of Preuss, et al. be not taken, hereinabove designated as a part of this record on appeal (Item 24 hereof).

37. Findings of fact and conclusions of law dated March 23, 1940.

38. Memorandum opinion of March 23, 1940.

39. Final decree of March 23, 1940.

[fol. 830] 40. Notice of appeal, with date of filing.

41. Supersedeas Bond.

42. Order of April 8, 1940 granting stay of final decree in certain limited respects and approving Supersedeas Bond, together with any supplement to or modification of said order on file at the time the record is certified to the Circuit Court of Appeals.

43. This designation.

44. Statement of appellant of points on which it intends to rely on appeal (filed herewith).

JAMES R. MORFORD,
Address: Delaware Trust Building,
Wilmington, Delaware.

HAROLD W. NORMAN,
Address: Des Moines Building,
Des Moines, Iowa.

CASPER SCHENK,
Address: Harris Trust Building,
Chicago, Illinois.

Attorneys for appellant, Phoenix Finance Corporation.

Acceptance of Service.

Service of the foregoing Designation by Defendant-Appellant of Contents of Record on Appeal pursuant to Rule 75 of Rules of Civil Procedure is hereby acknowledged and copies thereof received on this 12th day of April, 1940.

F. A. ONTJES,
W. C. GREEN,
Attorneys for Iowa-Wisconsin Bridge Company, complainant-appellee.

Filed in the District Court April 13, 1940.

[fol. 831] (Statement by Defendant-Appellant of the Points on Which It Intends to Rely on Appeal.)

Phoenix Finance Corporation, the defendant-appellant above named, by James R. Morford, Harold W. Norman and Casper Schenk, its attorneys, hereby states the points on which it intends to rely on said appeal as follows:

1. That the decree of the United States District Court for the Northern District of Iowa dated December 1, 1936 (Foreclosure Rec. p. 202) entered in the Mortgage Foreclosure Proceedings commenced in this Court on or about August 28, 1933 (said cause being No. 220 in Equity, the

same designation as this cause on Supplemental and Ancillary Bill of Complaint) wherein First Trust & Savings Bank (formerly Bechtel Trust Company) and A. H. Schubert, as Trustees, were the original complainants and Iowa-Wisconsin Bridge Company, the defendant, and the affirmance thereof by the Circuit Court of Appeals for the 8th Circuit by decree dated August 11, 1938 (Foreclosure Record p. 1709) does not constitute an adjudication against Phoenix Finance Corporation of the several issues and controversies mentioned in the Supplemental and Ancillary Bill of Complaint in this cause.

2. That the injunctive relief granted by the final decree in this cause dated March 23, 1940 on the Supplemental and Ancillary Bill of Complaint of Iowa-Wisconsin Bridge Company in so far as the same deals with certain actions pending in courts of competent jurisdiction of the State of Delaware is in violation of Section 265 of the Judicial Code of the United States.

3. That with respect to each of the actions pending in the courts of the State of Delaware, Iowa-Wisconsin Bridge Compay has available and has asserted the defense of res adjudicata, and if the issues involved in such actions have been legally adjudicated against Phoenix Finance Corporation, the courts in which such actions are pending are competent to give Iowa-Wisconsin Bridge Company the benefit of said defenses.

4. That by the final decree in this cause, Phoenix Finance Corporation has been deprived of property and property rights, in violation of Articles V and XIV of the Amendments to the Constitution of the United States.

5. That the District Court erred in striking portions of the Answer and Counterclaim of Phoenix Finance Corporation, in denying to Phoenix Finance Corporation the right to take depositions of witnesses pursuant to the Rules of Civil Procedure, and in refusing to permit the testimony of witnesses and the admission of exhibits on behalf of Phoenix Finance Corporation upon final hearing.

[fol. 832] 6. That the District Court erred in failing to require Iowa-Wisconsin Bridge Company as the party seeking the benefit of a former decree to show that the

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same was a right decree, and further erred in refusing to permit Phoenix Finance Corporation by its Answer and Counterclaim to the Supplemental and Ancillary Bill of Complaint as amended of Iowa-Wisconsin Bridge Company and by competent evidence and exhibits in [in] support thereof to challenge said former decree and to show that the same was induced by fraud, prejudicial misrepresentation and misstatements by counsel for the prevailing party and a misconception and erroneous assumption of the facts shown by the record.

7. That the District Court erred in the following orders, rulings and decree:

(a) Order of October 7, 1939 as amended by order of November 6, 1939, granting a preliminary injunction;

(b) Order of November 7, 1939 denying motion of Phoenix Finance Corporation for the appointment of an auditor;

(c) Order of December 18, 1939 striking portions of the Answer and Counterclaim of Phoenix Finance Corporation;

(d) Order of February 6, 1940, denying to Phoenix Finance Corporation the right to take the depositions of George E. Preuss, Edgar S. Gage and Lee J. Skoner;

(e) Order of March 5, 1940 denying to Phoenix Finance Corporation the right to take the depositions of John A. Thompson and Albert Penn;

(f) Rulings at final hearing on March 11, 1940 denying to Phoenix Finance Corporation the right to offer testimony by the witnesses, John A. Thompson, Albert Penn, Emory H. English and Lee J. Skoner, and in excluding Defendant's Exhibits SC-106, SC-107, SC-108, SC-109, SC-110, SC-111, SC-112, SC-113 and SC-114.

(g) Findings of Fact and Conclusions of Law of March 23, 1940.

(h) Final decree of March 23, 1940.

(i) Order of April 8, 1940 and any modification or amendment thereof, granting a limited and qualified stay

and suspension of said final decree of March 29, 1940 to the extent that any such order or modified order limits, qualifies or imposes any conditions whatsoever upon such stay or suspension.

[fol. 833]

JAMES R. MORFORD,
Address: Delaware Trust Building,
Wilmington, Delaware.

HAROLD W. NORMAN,
Address: Harris Trust Building,
Chicago, Illinois.

CASPER SCHENK,
Address: Des Moines Building,
Des Moines, Iowa.

Acceptance of Service

Service of the foregoing Statement by Defendant-Appellant of the Points on which it Intends to Rely on Appeal is hereby acknowledged and copies thereof received on this 12th day of April, 1940.

F. A. ONTJES,
W. C. GREEN,
Attorneys for Iowa-Wisconsin Bridge Company, Complainant-Appellee.

Filed in the District Court April 13, 1940.

[fol. 834] (Designation by Defendant Iowa-Wisconsin Bridge Company, Appellee, of Contents of Record on Appeal, Pursuant to Rule 75 of Rules of Civil Procedure.)

Iowa-Wisconsin Bridge Company, the defendant above named and appellee herein, by Fred A. Ontjes and Wm. C. Green, its attorneys, hereby, pursuant to Rule 75 of the Rules of Civil Procedure, designates the following portions of the record, proceedings and evidence on the supplemental and ancillary bill as amended, to be contained in the record on appeal, which were not designated by appellant, Phoenix Finance Corporation.

1. The entire record of this cause as certified on the 9th day of November, 1937, by the Clerk of the United States District Court for the Northern District of Iowa to the United States Circuit Court of Appeals for the Eighth Circuit, including the supplemental transcript of record of exceptions to the Master's Report, likewise certified by [fol. 835] said Clerk on the 28th day of February 1938 as the record on the original trial of this cause and which was before the United States District Court for the Northern District of Iowa, by judicial notice and offer in evidence on the hearing on the supplemental and ancillary bill of complaint herein; said record having been printed as Volumes I to V inclusive, and Supplemental Transcript of Record, and filed in the Circuit Court of Appeals in the aforesaid cause, designated in said Circuit Court of Appeals as Cause number 11055.

In connection with this designation, the defendant-appellee, Iowa-Wisconsin Bridge Company, offers to stipulate as follows:

It is hereby stipulated by and between the Phoenix Finance Corporation, appellant, and Iowa-Wisconsin Bridge Company, appellee, that in lieu of the aforesaid record being printed, the appellee consents that the appellant may file additional printed copies of said record, heretofore filed with the Clerk of the United States Circuit Court of Appeals and used on the original appeal in this cause, for use on the present pending appeal, and that the appellee agrees to consent to an application on the part of appellant to said Court for the entry of an order in accordance with this proposed stipulation.

2. The mandate of the Circuit Court of Appeals heretofore filed affirming the prior decision of the United States District Court for the Northern District of Iowa.

3. Order filed September 18th, 1939 fixing time for hearing and notice for preliminary injunction.

4. Notice for such hearing with marshal's return showing service on Phoenix Finance Corporation and Casper Schenk filed September 18th, 1939.

Note: If copy of Supplemental and Ancillary Bill and Amendment thereto are attached to such Notice it will be

sufficient to state that in notation instead of copying them together with statement that they are the same as the Sup-
[fol. 836] plemental and Ancillary Bill with exhibits thereto attached filed September 18th 1939.

5. Affidavit on behalf of Iowa-Wisconsin Bridge Company in support of its motion for preliminary injunction filed September 28, 1939.

6. Motion of Iowa-Wisconsin Bridge Company for leave to file Amendment to Supplemental and Ancillary Bill of Complaint filed September 28, 1939.

7. That portion of the transcript of testimony filed October 2, 1939 taken at hearing at Cedar Rapids, Iowa on September 28th 1939 on motion for preliminary injunction showing that counsel for the Iowa-Wisconsin Bridge Company asked the court to take judicial notice of all its records, files, depositions, evidence, decree and rulings had and made in this cause, and showing that counsel for the Iowa-Wisconsin Bridge Company offered the entire record in this cause in evidence and offered in evidence in support of said motion for preliminary injunction the affidavits filed in support thereof.

8. Preliminary injunction bond filed April 10, 1939 and showing receipt from Oscar R. Thorson, Receiver of $2000.00 in support of such bond as ordered by the Court.

9. Notice of hearing on December 5, 1939 of motion of Iowa-Wisconsin Bridge Company to strike answer of Phoenix Finance Corporation with acceptance of service thereof endorsed thereon filed December 1st 1939.

10. Notice of hearing on defendant, Iowa-Wisconsin Bridge Company's motion to strike intention to take depositions and that certain depositions be not taken set for February 6th 1940 with acceptance of service endorsed thereon filed January 25, 1940.

11. Notice of hearing on February 6th, 1940 on defendant, Iowa-Wisconsin Bridge Company's motion for order
[fol. 837] that depositions be not taken and acceptance of service thereon filed February 6, 1940.

12. Transcript record of proceedings at Dubuque, Iowa on February 6th 1940 on hearing on motions of Iowa-Wis-

consin Bridge Company asking that depositions of certain witnesses be not taken, which was ordered by the Court to be filed and made a part of the record.

13. Notice of hearing on March 5, 1940 on motion of Iowa-Wisconsin Bridge Company that depositions of John A. Thompson and Albert Penn be not taken with acceptance of service endorsed thereon filed February 14, 1940.

14. Order dated February 14, 1940 assigning motions that depositions be not taken and for trial of this cause on its merits at Sioux City on the 5th day of March 1940 at ten o'clock A. M. filed February 14, 1940.

15. Order entered re-assigning case for trial on March 11, 1940 at Sioux City, Iowa entered February 19, 1940.

16. Transcript of proceedings at Sioux City, Iowa on March 5, 1940 on hearing of defendant-appellee, Iowa-Wisconsin Bridge Company's motion for order that depositions of John A. Thompson and Albert Penn be not taken and resistance by Phoenix Finance Corporation thereto which was ordered filed by the court.

17. The following exhibits offered in evidence upon the trial on Supplemental and Ancillary Bill by the Iowa-Wisconsin Bridge Company, appellee, to-wit: Exhibits SC-1, SC-2, SC-3, SC-4, SC-5, SC-6 and SC-7.

18. This designation.

Dated April 18th, 1940.

FRED A. ONTJES,
Foresters Building,
Mason City, Iowa.

WM. C. GREEN,
906 Pioneer Building,
St. Paul, Minn.

Attorneys for Appellee, Iowa-Wisconsin Bridge Company.

[fol. 838]

Acceptance of Service

Service of the foregoing additional Designation by Appellee of Contents of Record on Appeal pursuant to Rule

75 of Rules of Civil Procedure is hereby acknowledged and copies thereof received on this 19th day of April 1940.

JAMES R. MORFORD,
H. W. NORMAN,
CASPER SCHENK,
Attorneys for Appellant,
Phoenix Finance Corporation.

Filed in the District Court April 20, 1940.

[fol. 839] (Statement Re Appellant's Designation No. 5.)

To:—Mr. Lee McNeely, Clerk of the United States District Court.

Comes now the Iowa-Wisconsin Bridge Company and respectfully states the following with respect to its designation number five, to-wit:

That designation number five designates a joint affidavit which includes the preceding page presenting such affidavit in support of motion for preliminary injunction; that attached to said affidavit are certain exhibits, certified exemplified copies of which were offered in evidence by appellee, Iowa-Wisconsin Bridge Company on the hearing for permanent writ of injunction as Exhibits SC-1, SC-2, SC-3, SC-4 and SC-5, and have been designated by appellee to be incorporated in the record, and appellee hereby requests the Clerk, instead of certifying such exhibits attached to said affidavit, but later offered in evidence by certified exemplified copies aforesaid, to make notation [fol. 840] with respect to such exhibits attached to said affidavit as follows, to-wit:

1. That Exhibits 1 and 1-a attached to said affidavit are the same as Exhibit SC-1 offered on the trial of permanent writ of injunction, which are set out in the record, excepting that they are not certified and exemplified, while Exhibit SC-1 is certified and exemplified.

2. That Exhibit 2 attached to said affidavit is the same as Exhibit SC-2 offered on trial of permanent writ of injunction by appellee Iowa-Wisconsin Bridge Company, which is set out in the record, excepting that it is not cer-

tified and exemplified, while Exhibit SC-2 is certified and exemplified.

3. That Exhibit 3 and 3-a attached to said affidavit are the same as Exhibit SC-3, which was offered on the trial of permanent Writ of Injunction by appellee, Iowa-Wisconsin Bridge Company, and which are set out in the record, excepting that they are not certified and exemplified, while Exhibit SC-3 is certified and exemplified and excepting Exhibit SC-3 also contains copy of summons.

4. That Exhibit 4 attached to said affidavit is the same as Exhibit SC-4 offered on trial of permanent writ of injunction by appellee, Iowa-Wisconsin Bridge Company, which is set out in the record, excepting that it is not certified and exemplified, while Exhibit SC-4 is certified and exemplified, and excepting Exhibit SC-4 also contains copy of summons.

5. That Exhibits 5 and 5-a attached to said affidavit are the same as Exhibit SC-5 offered on the trial of permanent writ of injunction by appellee, Iowa-Wisconsin Bridge Company, which are set out in this record, excepting that they are not certified and exemplified, while Exhibit SC-5 is certified and exemplified, and excepting Exhibit SC-5 [fol. 841] also includes copy of summons, while Exhibits 5 and 5-a do not, and excepting Exhibits 5 and 5-a include the following paper with reference to mistake of form of action and order thereon, to-wit:

"In the Superior Court of the State of Delaware in and for New Castle County

September Term 1939.

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware,

No. 79. vs.

Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware.

The Plaintiff above named, by Marvel, Morford & Logan, its attorneys, says that it has mistaken the form of action suited to its claim in the above cause, and moves that it be

permitted to amend the form of the above action from an action of case to an action of debt, that being the form of action suited to its claim.

MARVEL, MORFORD & LOGAN,
Attorneys for Plaintiff.

And Now, To-Wit, this 18th day of September, A. D. 1939, the within motion having been considered by the Court, the same is allowed, and the form of the within action is changed from an action of case to an action of debt.

(S. L.) F. L. SPEAKMAN,
J."

That all of the exhibits attached to said affidavit not included in the aforesaid certified exemplified copies be set out as a part of said affidavit.

Respectfully submitted,

FRED A. ONTJES,
WM. C. GREEN,
Attorneys for Appellee, Iowa-Wisconsin Bridge Co.

Filed in the District Court April 23, 1940.

[fol. 842] Acceptance of Service.

Service of the foregoing Statement Re Appellee's Designation Number 5 is hereby acknowledged and copies thereof received on this 20th day of April 1940.

JAMES R. MORFORD,
H. W. NORMAN,
CASPER SCHENK,
Attorneys for Phoenix Finance Corporation, Appellant.

Filed in the District Court April 23, 1940.

[fol. 843] (Application to Send Original Exhibits to the Appellate Court.)

Comes now the Phoenix Finance Corporation by its Counsel, Casper Schenk and respectfully moves that an order be entered herein directing the Clerk of this Court to send to the Circuit Court of Appeals, Eighth Circuit, the following Exhibits heretofore offered and admitted or refused in this cause for the inspection of said Appellate Court, and in lieu of copies for the preparation of the record herein on appeal:

Exhibit S.C.-101,
Exhibit S.C.-102,
Exhibit S.C.-103,
Exhibit S.C.-104,
Exhibit S.C.-105,
Exhibit S.C.-110,
Exhibit S.C.-111,
Exhibit S.C.-112,
Exhibit S.C.-113,
Exhibit S.C.-114.

CASPER SCHENK,
Attorney for Phoenix Finance Corporation.

Filed in the District Court April 23, 1940.

[fol. 844] (Order for Forwarding of Certain Original Exhibits to Appellate Court.)

Be It Remembered, that on this 23rd day of April, 1940, the Application of Appellant, Phoenix Finance Corporation for an Order directing the certification of exhibits to the Circuit Court of Appeals Eighth Circuit came on for hearing, said Phoenix Finance Corporation appearing by its Attorney Casper Schenk and Iowa-Wisconsin Bridge Company appearing by its Attorney F. A. Ontjes, and the Court having examined said application and having heard the statements of counsel, and being fully advised in the premises, finds that the parties have stipulated that said Order may be entered herein provided that the offers and rulings made with respect to said Exhibits and exceptions to said rulings are not modified hereby.

It is, therefore, Ordered that the Clerk of this Court be and he is hereby directed to certify and transmit to the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit the original exhibits named in said Application, to-wit:

Exhibit S.C.-101,
Exhibit S.C.-102,
Exhibit S.C.-103,
Exhibit S.C.-104,
Exhibit S.C.-105,
Exhibit S.C.-110,
[fol. 845] Exhibit S.C.-111,
Exhibit S.C.-112,
Exhibit S.C.-113,
Exhibit S.C.-114.

That said Exhibits are to be transported to said Cierk of said Circuit Court of Appeals Eighth Circuit, for the use of said Clerk in preparing the record on appeal, and for the inspection of the Court on the hearing in said cause, and are to be returned to the Clerk of this Court when no longer needed for said purpose.

The offers and rulings with respect to said Exhibits and the exceptions to said rulings are not modified hereby.

GEO. C. SCOTT,
United States District Judge.

Filed in the District Court, April 23, 1940.

[fol. 846] (Supplemental Explanation in re Defendant-Appellants' Designation No. 15 and Agreement to Stipulation Suggested by Appellee's Designation No. 1.)

Phoenix Finance Corporation, the defendant named in the supplemental and ancillary bill of complaint as amended of Iowa-Wisconsin Bridge Company and the [appeallant] herein, by James R. Morford, Harold W. Norman and Casper Schenk, its attorneys, hereby supplements item 15 of the designation heretofore served and filed in the following respects:

Add notation to the effect that paragraph 17 (e) incorporates by reference Exhibits L, M, N, J, K and I to the answer and cross-bill of Phoenix Finance Corporation filed on October 9, 1939 and stricken by order of Court dated November 7, 1939; that said exhibits are to be found in the printed record on appeal to the Circuit Court of Appeals in the foreclosure proceeding in this cause beginning at printed record pages as follows:

Exhibit L—p. 798
Exhibit M—p. 850
Exhibit N—p. 1395
Exhibit J—p. 1393
Exhibit I—p. 340

Include as a part of the record and as an exhibit to the answer and counterclaim of Phoenix Finance Corporation Exhibit K to said answer and cross-bill and made an exhibit to the answer and counterclaim by reference as aforesaid.

And the said defendant-appellant, by its said attorneys, hereby agrees to the stipulation offered in item 1 of appellee's designation.

The defendant-appellant further designates this supplemental explanation and agreement to be included as a part of the record on appeal.

JAMES R. MORFORD,
Address: Delaware Trust Building,
Wilmington, Delaware.

HAROLD W. NORMAN,
Address: Harris Trust Building,
Chicago, Illinois.

CASPER SCHENK,
Address: Des Moines Building,
Des Moines, Iowa.
Attorneys for Appellant, Phoenix Finance Corporation.

[fol. 847] Acceptance of Service.

Service of the foregoing Supplemental Explanation in re Defendant-Appellants' Designation No. 15 and Agreement to Stipulation suggested by Appellee's Designation No. 1 is hereby acknowledged and copies thereof received on this 24th day of April, 1940.

F. A. ONTJES,
W. C. GREEN,
Attorneys for Iowa-Wisconsin Bridge Company, complainant-appellee.

Filed in the District Court April 25, 1940.

[fol. 848] (Docket Entries in District Court.)

Sept. 18, 1939. Filed defendant's motion for leave to file Supplemental and Ancillary Bill.

Sept. 18, 1939. Filed Notice of Motion for leave to file Supplemental and Ancillary Bill, with return thereon by Marshal for the Southern District of Iowa showing service thereof on Casper Schenk as resident agent and attorney of record for Phoenix Finance Corporation.

Sept. 18, 1939. Filed and entered Order made by Hon. Geo. C. Scott, Judge, Sept. 18, 1939, granting Defendant leave to file Supplemental and Ancillary Bill. (Eq. Jr. page 418).

Sept. 18, 1939. Filed Supplemental and Ancillary Bill by Iowa-Wisconsin Bridge Co.

Sept. 18, 1939. Filed Defendant's Motion for Preliminary Injunction.

Sept. 18, 1939. Filed and entered Order made by Hon. Geo. C. Scott, Judge, September 18, 1939, Fixing Time of Hearing and Notice for Preliminary Injunction September 28, 1939, at 2 o'clock P. M. at Cedar Rapids. (Eq. Jr. page 419).

Sept. 18, 1939. Filed Notice with Marshal's return showing service on Phoenix Finance Corporation and on Casper Schenk.

Sept. 28, 1939. Filed affidavit on behalf of Iowa-Wisconsin Bridge Company in support of its Motion for preliminary injunction.

Sept. 28, 1939. Filed Resistance of Phoenix Finance Corporation, Intervener, to application and motion for preliminary injunction.

Sept. 28, 1939. Filed motion of defendant Iowa-Wisconsin Bridge Company for leave to file amendment to supplemental and ancillary bill of complaint.

Sept. 28, 1939. Entered hearing on motion for preliminary injunction, and resistance thereto in open Court at Cedar Rapids, including order of Court granting defendant Iowa-Wisconsin Bridge Company leave to file amendment to supplemental and ancillary bill of complaint, and taking submission of the motion and resistance thereto, subject to filing of briefs by both sides within five days; reporter to file his transcript within five days. (Entered Eq. Jr.—page 422).

Mailed copy of said entry to Casper Schenk, Des Moines, of counsel for Phoenix Finance Corporation; and to F. A. Ontjes, Mason City, of counsel for Iowa-Wisconsin Bridge Company, Defendant.

[fol. 849]

Sept. 28, 1939. Filed Defendant Iowa-Wisconsin Bridge Company's Amendment to Supplemental and Ancillary Bill of Complaint.

Oct. 2, 1939. Filed original certified transcript by Vernon L. Grant, certified shorthand reporter, of testimony taken at hearing at Cedar Rapids on September 28, 1939.

Oct. 3, 1939. Filed Brief on behalf of Phoenix Finance Corporation resisting motion for an Injunction.

Oct. 7, 1939. Filed Findings of Fact and Conclusions of law, and entered same of record. (Eq. Jr., page 423).

Oct. 7, 1939. Filed Order for Preliminary Injunction, and entered same of record. (Eq. Jr., page 435).

Oct. 7, 1939. Filed Order for deposit of $2,000.00 by Receiver in lieu of surety on Injunction bond. (Eq. Jr. page 443).

Oct. 9, 1939. Filed Answer of Phoenix Finance Corporation to Supplemental and Ancillary Bill as amended, and cross-bill.

Oct. 10, 1939. Received from Oscar R. Thorson, Receiver, and deposited in Registry of Court, $2000.00 in lieu of surety on bond for preliminary injunction.

Oct. 10, 1939. Filed Preliminary Injunction bond, of Iowa-Wisconsin Bridge Company by H. A. Schremser, President, attested by Irene M. Bell, Secretary.

Oct. 10, 1939. Mailed to U. S. Marshal, Des Moines, Iowa, copies of Order for preliminary injunction for service on Casper Schenk, Iowa Agent, also attorney for Phoenix Finance Corporation, also upon Emory H. English, as officer and Agent of Phoenix Finance Corporation; as requested by counsel for Iowa-Wisconsin Bridge Company.

Oct. 18, 1939. Filed Report of Oscar R. Thorson, Receiver, for the months of July, August and September, 1939, inclusive.

Oct. 23, 1939. Filed Motion of Defendant, Iowa-Wisconsin Bridge Company to Strike from Answer of the Phoenix Finance Corpora-

tion to Supplemental and Ancillary Bill as Amended and Cross Bill.

Oct. 25, 1939. Filed Notice of Hearing by Defendant, Iowa-Wisconsin Bridge Company on Motion, with acceptance of service endorsed thereon by James R. Morford, H. W. Norman and Casper Schenk, Attorneys for Phoenix Finance Corporation, on October 23rd, 1939.

Oct. 25, 1939. Filed Supplement to Motion of Defendant, Iowa-Wisconsin Bridge Company to Strike.

[fol. 850]

Oct. 28, 1939. Filed Amendment of Answer of Phoenix Finance Corporation to Supplemental and Ancillary Bill as amended and cross bill.

Oct. 31, 1939. Filed defendant's second supplement to motion to strike.

Oct. 31, 1939. Filed defendant's notice of hearing of motion to strike and supplement thereto with acceptance of service thereon by Phoenix Finance Corporation.

Nov. 2, 1939. Filed motion for appointment of an auditor with notice of hearing attached thereto of Phoenix Finance Corporation.

Nov. 2, 1939. Filed Notice of hearing of Defendant of Second Supplement to Motion to Strike.

Nov. 6, 1939. Filed acceptance of service by Phoenix Finance Corporation of motion for appointment of an auditor and notice of hearing of same at Dubuque on Nov. 7, 1939, showing receipt of copy of both the motion and notice on November 2, 1939.

Nov. 6, 1939. Filed and entered Order made by Hon. Geo. C. Scott, Judge, dated November 6, 1939, modifying the Order of October 7, 1939, by deleting and elim-

inating the provisions of said Order and Interlocutory Decree relative to the $50,000.00 mortgage referred to in the Supplemental and Ancillary Complaint; and enjoining the Respondent Phoenix Finance Corporation and all persons representing or acting for it from either disposing of said mortgage or in any way attempting to enforce the same, pending further Order of this Court. (Eq. Jr. page 444).

Nov. 7, 1939. Filed and entered Order made by Hon. Geo. C. Scott, Judge of this Court, dated Nov. 7, 1939, sustaining defendant's supplement to the original Motion to Strike and said Second Supplement to the Motion to Strike; and striking the Answer of the Phoenix Finance Corporation to the Iowa-Wisconsin Bridge Company's Supplemental and Ancillary Complaint as amended and the Amendment to said Answer in their entirety; and ordering the Phoenix Finance Corporation to answer the Iowa-Wisconsin Bridge Company's Supplemental Complaint as Amended within 20 days from this date, the Answer to conform with Rule 8 of Rules of Civil Procedure. (Eq. Jr., p. 446).

Nov. 7, 1939. Filed and entered Order made by Hon. Geo. C. Scott, Judge of this Court, dated Nov. 7, 1939, overruling the Motion of Phoenix Finance Corporation for the appointment of an auditor, and denying the appointment of an auditor. (Eq. Jr. page 447).

[fol. 851]

Nov. 17, 1939. Filed Amendment to Transcript by Vernon L. Grant, Short-hand reporter at hearing at Cedar Rapids.

Nov. 27, 1939. Filed Answer and Counterclaim of Phoenix Finance Corporation to the Ancillary and Supplemental Bill as amended.

Nov. 28, 1939. Filed acceptance of service of Answer and Counterclaim of Phoenix Finance Corporation, and acknowledgment of receipt of two copies thereof by F. A. Ontjes and W. C. Green, Counsel for Iowa-Wisconsin Bridge Co.

Nov. 28, 1939. Motion of Defendant Iowa-Wisconsin Bridge Company to strike Answer and Counterclaim of Phoenix Finance Corporation.

Dec. 1, 1939. Filed Notice of hearing on Dec. 5, 1939, on Motion of Defendant Iowa-Wisconsin Bridge Company to strike the answer of Phoenix Finance Corporation, with acceptance of service thereof endorsed thereon by James R. Morford, H. W. Norman, and Casper Schenk, Attorneys for Phoenix Finance Corporation.

Dec. 5, 1939 Filed application of defendant Iowa-Wisconsin Bridge Co. for an order directing payment of $1150.00 attorneys' fees.

Dec. 5, 1939. Filed Order made by Hon. Geo. E. Scott, Judge, dated December 5, 1939, allowing payment of $1150.00 attorneys' fees. (Eq. Jr., p. 448).

Dec. 5, 1939. Entered of record submission of Motion of Defendant, Iowa-Wisconsin Bridge Company to Strike the Answer and Counter-claim of Phoenix Finance Corporation, and said Motion is argued by counsel, and, by the Court, taken under advisement. (Eq. Jr., p. 448).

Dec. 18, 1939. Filed and entered Order made December 18, 1939, on Complainants' Motion, striking certain parts of Answer of Phoe-

nix Finance Corporation to Supplemental and Ancillary complaint. (Eq. Jr., p. 450).

Dec. 28, 1939. Filed Phoenix Finance Corporation's Notice of Intention to Take Depositions.

Jan. 4, 1940. Filed Acceptance of service of Notice of Intention to take depositions by Counsel for Iowa-Wisconsin Bridge Company.

Jan. 24, 1940. Filed Motion of Defendant, Iowa-Wisconson Bridge Company, to strike Phoenix Finance Corporation's Notice of Intention to take depositions and for order that specified parties' depositions not be taken.

[fol. 852]

Jan. 25, 1940. Filed Notice of hearing on Defendant's Motion to Strike Notice of intention to take Depositions, set for February 6, 1940, at Dubuque, with acceptance of service of notice endorsed thereon by counsel for Phoenix Finance Corporation.

Jan. 25, 1940. Filed Motion of Defendant Iowa-Wisconsin Bridge Company for Order that depositions be not taken.

Jan. 25, 1940. Filed Motion and application of Iowa-Wisconsin Bridge Company for an order that depositions be not taken until further order of Court.

Jan. 25, 1940. Filed Application of Defendant Iowa-Wisconsin Bridge Company for Order for expense money for attorneys.

Jan. 25, 1940. Filed and entered Order made by Hon. Geo. C. Scott, Judge of this Court, dated Jan. 25, 1940, that the depositions of George E. Preuss, Edgar S. Gage and Lee J. Skoner be not taken until the Court has ruled on the motions on file in this case (Eq. Jr., p. 452) Copies of this

order sent F. A. Ontjes, Casper Schenk, James R. Morford and Harold W. Norman, Jan. 26.

Jan. 25, 1940. Filed and entered Order made by Hon. Geo. C. Scott, Judge of this Court, dated Jan. 25, 1940, directing Oscar R. Thorson, Receiver, to pay to F. A. Ontjes the sum of $300.00 for the purposes mentioned in the application of Defendant Iowa-Wisconsin Bridge Company. (Eq. Jr., page 453). Certified copy of this order sent Oscar R. Thorson, Des Moines. Copies sent F. A. Ontjes, James R. Morford, Harold W. Norman and Casper Schenk, January 26, 1940.

Feb. 2, 1940. Filed Resistance of Phoenix Finance Corporation to motions heretofore filed by Iowa-Wisconsin Bridge Company regarding notice of Phoenix-Finance Corporation to take depositions of certain witnesses; also exhibit to said Resistance. (Endorsement on original Resistance showing receipt of copy and acceptance of service by F. A. Ontjes for Iowa-Wis. Bridge Co. on Jan. 31, 1940).

Feb. 2, 1940. Filed Report of Oscar R. Thorson, Receiver, for the months of October, November and December, 1939, inclusive.

Feb. 6, 1940. Notice of hearing on Feb. 6, 1940, on Defendant's Iowa-Wisconsin Bridge Company's Motion for Order that depositions be not taken, with acceptance of service thereof endorsed thereon by James R. Morford, H. W. Norman, and Casper Schenk, Attorneys for Phoenix Finance Corporation, on Jan. 25, 1940.

[fol. 853]

Feb. 6, 1940. Notice of hearing on Defendant's Iowa-Wisconsin Bridge Company's Motion and Application for an Order that Deposi-

tions be not taken until further Order of Court, with acceptance of service thereof endorsed thereon by James R. Morford, H. W. Norman, and Casper Schenk, Attorneys for Phoenix Finance Corporation, on Jan. 25, 1940.

Feb. 6, 1940. Filed and entered Order by Hon. Geo. C. Scott, Judge, dated February 6, 1940, that depositions of George E. Preuss, Edgar S. Gage and Lee J. Skoner shall not be taken. (Eq. Jr., page 454). Copy of this order sent F. A. Ontjes, Casper Schenk, Des Moines, and James R. Morford, Wilmington, Delaware.

Feb. 6, 1940. Filed Reporter's transcript of hearing on Motion of Iowa-Wisconsin Bridge Company asking that depositions of certain witnesses be not taken.

Feb. 12, 1940. Filed Notice by Phoenix Finance Corporation of taking Deposition of John A. Thompson at St. Petersburg, Florida, on February 23, 1940, with acceptance of service of notice endorsed thereon by F. A. Ontjes and W. C. Green, Attorneys for Iowa-Wisconsin Bridge Co.

Feb. 12, 1940. Filed Notice by Phoenix Finance Corporation of taking deposition of Albert Penn, of Goshen, Indiana, at 1709 Harris Trust Building, Chicago, Ills., on February 27, 1940, with service of Notice accepted by F. A. Ontjes and W. C. Green, Attorneys for Iowa-Wisconsin Bridge Co.

Feb. 12, 1940. Filed Motion of Defendant Iowa-Wisconsin Bridge Co. for order that Depositions of John A. Thompson and Albert Penn not be taken, and, in alternative, to limit scope of depositions.

Feb. 14, 1940. Filed Notice of hearing on March 5, 1940, on Motion that Depositions of John A. Thompson and Albert Penn not be taken,

with acceptance of service of notice endorsed thereon.

Feb. 14, 1940. Filed Application of Iowa-Wisconsin Bridge Co. for an order that depositions of John A. Thompson, and Albert Penn not be taken until further order of Court.

Feb. 14, 1940. Filed and entered Order made by Hon. Geo. C. Scott, Judge of this Court, dated February 14, 1940, that depositions of John A. Thompson and Albert Penn not be taken until ruling on motion. (Eq. Jr., p. 455).

[fol. 854]

Feb. 14, 1940. Filed and entered Order made by Hon. Geo. C. Scott, Judge of this Court, dated February 14, 1940, assigning motion that depositions not be taken and for trial of case on its merits at Sioux City on March 5th, 1940 at ten o'clock, A. M. (Eq. Jr. page 456).

Feb. 14, 1940. Copies of last above noted Order sent Mr. F. A. Ontjes, Mason City, Mr. James R. Morford, Wilmington, Delaware, and Mr. Casper Schenk, Des Moines, by the Court from Sioux City.

Feb. 15, 1940. Copies of Order of Feb. 14, 1940, that depositions of John A. Thompson and Albert Penn not be taken until ruling on motion, sent to Mr. F. A. Ontjes, Mason City, Mr. James R. Morford, Wilmington, Delaware, and Mr. Casper Schenk, Des Moines, by Lee McNeely, Clerk, from Dubuque.

Feb. 17, 1940. Filed Application of Iowa-Wisconsin Bridge Co. for order to pay cost of transcript.

Feb. 19, 1940. Filed and entered Order made by Hon. Geo. C. Scott, Judge, on February 19th re-assigning this case for trial on March

11, 1940, at 2 P. M. at Sioux City. (Eq. Jr. 1, page 457).

Feb. 19, 1940. Filed and entered Order made by Hon. Geo. C. Scott, Judge, February 19, directing receiver pay cost of transcript, and postage. (Eq. Jr., 1, page 458).

Certified copy of above order sent Oscar Thorson, Receiver, at Des Moines.

Feb. 23, 1940. Filed Application of Receiver Oscar R. Thorson, for order granting leave to replace pile ice-break clusters of bridge.

Feb. 23, 1940. Filed and entered Order by Hon. Geo. C. Scott, Judge, granting Receiver leave to replace pile ice-break clusters of bridge. (Eq. Jr., page 459). Certified copy of Order sent Oscar Thorson at Des Moines.

Feb. 29, 1940. Filed Resistance of Phoenix Finance Corporation to Motion of Iowa-Wisconsin Bridge Company for Order that depositions of John A. Thompson and Albert Penn be not taken; with acceptance of service thereof endorsed thereon by counsel for Iowa-Wisconsin Bridge Company.

March 5, 1940. Filed and entered Order made by Hon. Geo. C. Scott, Judge, dated March 5, 1940, that the depositions of John A. Thompson and Albert Penn shall not be taken. Exceptions reserved to the Phoenix Finance Corporation. (Eq. Jr., page 460).

[fol. 855]

Mar. 11, 1940. Filed and entered record of hearing before the Court at Sioux City on this date upon supplemental and ancillary bill of complaint of Iowa-Wisconsin Bridge Company and answer thereto and cross-bill of Phoenix Finance Corporation; evidence taken and the cause fully submitted

and taken under advisement by the Court. (Eq. Jr., page 461).

Mar. 22, 1940. Filed Reporter's transcript of hearing at Sioux City on March 11, 1940. (Fee $28.15).

Mar. 22, 1940. Filed Exhibits S. C. 1 to S. C. 7 inclusive.

Mar. 22, 1940. Filed Exhibits S. C. 101 to S. C. 114 inclusive.

Mar. 23, 1940. Filed and entered Findings of Fact and Conclusions of Law made by Hon. Geo. C. Scott, Judge, on March 23, 1940. (Eq. Jr. 1, page 462).

Mar. 23, 1940. Filed Memorandum Opinion of Hon. Geo. C. Scott, Judge.

Mar. 23, 1940. Filed and entered Final Decree made by Hon. Geo. C. Scott, March 23, 1940. (Eq. Jr. 1, page 481).

Mar. 23, 1940. Filed Clerk's Statement of costs taxed on Supplemental Bill of Complaint in total sum of $83.15.

Mar. 23, 1940. Entered Judgment for costs in sum of $83.15 on Supplemental Bill, against Phoenix Finance Corporation and in favor of Iowa-Wisconsin Bridge Company. (Judgment Docket D, page 97).

Mar. 25, 1940. Issued Writ of Permanent Injunction, with copy of Findings of Fact and Conclusions of Law; Memorandum Opinion of the Court; and Final Decree, attached thereto; and mailed same with two copies thereof to U. S. Marshal, Des Moines, Iowa, for service on Phoenix Finance Corporation by serving Casper Schenk as resident agent and as attorney of record of Phoenix Finance Corporation.

Mar. 26, 1940. Issued Writs of Permanent Injunction with copies thereof and sent same to U.

S. Marshals for service on Phoenix Finance Corporation as follows:

At Wilmington, Delaware, by serving James R. Morford, and Josiah Marvel, Jr. each as attorney of record of Phoenix Finance Corporation.

At Jacksonville, Florida, by serving John A. Thompson, St. Petersburg, Florida, as director, officer and agent of Phoenix Finance Corporation.

At South Bend, Indiana, by serving Albert Penn, Goshen, Indiana, as President of Phoenix Finance Corporation.

[fol. 856]

Mar. 26, 1940. (Continued) At Chicago, Illinois, by serving H. W. Norman, 1709 Harris Trust Bldg., Chicago, Illinois, as attorney of record of Phoenix Finance Corporation.

Apr. 1, 1940. Filed Return by U. S. Marshal for District of Delaware upon Writ of Permanent Injunction showing service upon Phoenix Finance Corporation by serving James R. Morford and Josiah Marvel, Jr., Wilmington, Delaware, Attorneys of record, on March 27, 1940. (Fees & costs $4.12).

Apr. 1, 1940. Filed Notice of Appeal from the Decree of March 23, 1940, by Phoenix Finance Corporation.

Apr. 1, 1940. Pursuant to Rule 73-b of Rules of Civil Procedure, mailed copy of Notice of Appeal to F. A. Ontjes, Mason City, Iowa, and W. C. Green, St. Paul, Minn., Attorneys for Iowa-Wisconsin Bridge Co.

Apr. 6, 1940. Filed Writ of Permanent Injunction with Return by U. S. Marshal for Southern District of Iowa, showing service on Cas-

per Schenk, as resident agent of Phoenix Finance Corporation in State of Iowa, also as attorney of record for Phoenix Finance Corporation, on March 27, 1940. (Marshal's costs $4.06).

Apr. 8, 1940. Filed Writ of Permanent Injunction with return by U. S. Marshal, Southern District of Florida, showing service on Phoenix Finance Corporation by delivering copy of writ to John A. Thompson, Director, Officer and Agent of Phoenix Finance Corporation at St. Petersburg, Florida, on April 2, 1940. (Marshal's costs $3.32).

Apr. 8, 1940. Filed and entered Order Granting Stay and Approving Supersedeas Bond, made by Hon. Geo. C. Scott, Judge of this Court, on April 8, 1940. (Eq. Jr., pages 485-486 Inc.).

Apr. 9, 1940. Filed Supersedeas bond in sum of $20,000.00 with U. S. Fidelity and Guaranty Company as surety thereon.

April 10, 1940. Filed and entered Order made by Hon. Geo. C. Scott, Judge of this Court, dated April 10, 1940, modifying Order Granting Stay and approving Supersedeas Bond entered on April 8, 1940. (Eq. Jr., pages 487-488 Inc.).

April 10, 1940. Copies of above Order sent Messrs. F. A. Ontjes and Casper Schenk by the Court from Sioux City.

April 10, 1940. Filed Application of Iowa-Wisconsin Bridge Co. for payment of Reporters' fees.

[fol. 857]

Apr. 10, 1940 Filed and entered Order made by Hon. Geo. C. Scott, Judge of this Court, dated April 10, 1940, directing the Receiver to pay to R. C. Turner, Sioux City, Reporter, $51.37, and to Daniel F. Wolcott, Wi-

mington, Delaware, $44.40 costs of transcript, and directing Clerk to assess same as costs in the case. (Eq. Jr., pages 488-489 Inc.).

Certified copy of this order mailed to Oscar R. Thorson, Receiver, Des Moines, Iowa.

Entered additional sum of $25.87 on Judgment on page 254 of Judgment Docket C, pursuant to Order of this date.

April 13, 1940. Filed Designation by Defendant-Appellant, Phoenix Finance Corporation of contents of record on appeal pursuant to Rule 75 of Rules of Civil Procedure.

April 13, 1940. Filed Statement by Defendant-Appellant, Phoenix Finance Corporation of the Points on which it intends to rely on Appeal.

April 16, 1940. Filed Writ of Permanent Injunction with Return thereon by U. S. Marshal for Northern District of Illinois showing service on Phoenix Finance Corporation by serving H. W. Norman, Attorney of record, on April 1, 1940. (Marshal's fees & costs $2.06).

April 17, 1940. Filed Report of Oscar R. Thorson, Receiver, for months of January, February and March, 1940, inclusive.

April 20, 1940. Filed Designation by Defendant Iowa-Wisconsin Bridge Company, Appellee, of contents of record on Appeal; with acceptance of service thereof endorsed thereon by Counsel for Appellant Phoenix Finance Corporation, under date of April 19, 1940.

April 20, 1940. Filed Phoenix Finance Corporation's Notice of taking depositions of George E. Preuss, Edgar S. Gage and Lee J. Skoner, in Chicago on January 29, 1940,

before Roy Fuller, Notary Public; with acceptance of service thereof endorsed thereon by Attorneys for Iowa-Wisconsin Bridge Company, on January 24, 1940.

April 20, 1940. Filed Phoenix Finance Corporation's notice of taking depositions of George E. Preuss, Edgar S. Gage, and Lee J. Skoner, in Chicago on February 29, 1940, before Roy Fuller, Notary Public, with acceptance of service thereof endorsed thereon by Attorneys for Iowa-Wisconsin Bridge Company, on January 23, 1940.

[fol. 858]

April 20, 1940. Filed Letter dated April 15, 1940, from James R. Morford of Counsel for Phoenix Finance Corporation, requesting certification and transmission of parts of record designated by Appellant as provided by Rule 75 (j).

April 23, 1940. Filed Statement re Appellee's Designation No. 5; with receipt of copies endorsed thereon by Counsel for Phoenix Finance Corporation.

April 23, 1940. Filed Application of Phoenix Finance Corporation to send original exhibits to the Appellate Court.

April 23, 1940. Filed and entered Order made by Hon. Geo. C. Scott, Judge, granting application of Phoenix Finance Corpn. to send certain original exhibits to Appellate Court.

April 25, 1940. Filed Phoenix Finance Corporation's Supplemental Explanation in re Defendant-Appellant's Designation No. 15 and Agreement to Stipulation suggested by Appellee's Designation No. 1; with acceptance of service thereof endorsed thereon by Counsel for Iowa-Wisconsin Bridge Company, Complainant-Appellee, under date of April 24, 1940.

[fol. 859] (Amendment to Designation of Defendant-Appellant Deleting Certain Portions of Item 36 of Defendant-Appellant's Designation.)

Phoenix Finance Corporation, the defendant named in the supplemental and ancillary bill of complaint as amended of Iowa-Wisconsin Bridge Company and the appellant herein, by James R. Morford, Harold W. Norman and Casper Schenk, its attorneys, hereby amends its Designation of the contents of the record on appeal as heretofore served and filed, in the following respects:

By deleting from Item 36 of said Designation the following words and figures:

"and those portions only of Defendant's Exhibits SC-110 and SC-111 representing stenographic transcripts of statements made by John A. Thompson at the stockholders' meeting of the Iowa-Wisconsin Bridge Company of July 8, 1939 and December 6, 1938 respectively,"

It is the intention of the defendant-appellant by this amendment to omit entirely from its designation for inclusion in the record on appeal defendant's exhibits SC-110 and SC-111.

The defendant-appellant further designates this amendment to be included as a part of the record on appeal.

JAMES R. MORFORD,
Address: Delaware Trust Building,
Wilmington, Delaware.

HAROLD W. NORMAN,
Address: Harris Trust Building,
Chicago, Illinois.

CASPER SCHENK,
Address: Des Moines, Building,
Des Moines, Iowa.
Attorneys for Appellant,
Phoenix Finance Corporation.

Acceptance of Service.

Service of the foregoing Amendment to Designation of Defendant-Appellant Deleting Certain Portions of Item 36 of Defendant-Appellant's Designation is hereby ac-

knowledged and copies thereof received on this 4th day of May, 1940.

F. A. ONTJES,
W. C. GREEN,
Attorneys for Iowa-Wisconsin Bridge Company, complainant-appellee.

Filed in the District Court May 6, 1940.

[fol. 860] (Clerk's Certificate to Transcript.)

United States of America,
Northern District of Iowa.—ss.:

I, Lee McNeely, Clerk of the District Court of the United States in and for the Northern District of Iowa, hereby certify that the foregoing transcript, consisting of pages 1 to 859, contains a full, true and correct copy of such parts of the record, files and proceedings on Supplemental and Ancillary Bill of Complaint as amended as are called for in the designations of contents of record on appeal, filed in cause No. 220 Equity, Eastern Division of the Northern District of Iowa, wherein Phoenix Finance Corporation is Appellant, and Iowa-Wisconsin Bridge Company, a corporation, is Appellee; as full, true and correct as the originals of the same remain on file and of record in my office as such Clerk at Dubuque, Iowa, in said District.

Seal
U. S. Dist. Court
North. Dist.
of Iowa.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Dubuque, Iowa, in said District this 21st day of May, 1940.

LEE McNEELY, Clerk,
United States District Court,
Northern District of Iowa.

Refiled May 22, 1940, after completion by Clerk of District Court, E. E. Koch, Clerk.

[fol. 861] (Order Directing Clerk to Return Transcript of Record and Exhibits to Clerk of District Court, etc.)

United States Circuit Court of Appeals,
Eighth Circuit.

March Term, 1940.

Tuesday, April 30, 1940.

Phoenix Finance Corporation, Appellant,
No. 11,734. vs.
Iowa-Wisconsin Bridge Company, Appellee.

Appeal from the District Court of the United States for the Northern District of Iowa.

It having been brought to the attention of the Court that the record in the above case as transmitted by the Clerk of the District Court for the Northern District of Iowa is not in a form complying with the Rules of this Court or of the Rules of Civil Procedure,

It is Ordered that the Clerk of this Court be directed to return all of said papers transmitted by the Clerk of the above District Court with the direction to prepare the record for this Court in accordance with the above Rules and transmit such record to the Clerk of this Court on or before thirty (30) days from this date.

April 30, 1940.

[fol. 862] (Order Denying Motion of Appellant for Advancement of Case For Hearing and For Approval of Stipulation With Respect to Record on Appeal.)

United States Circuit Court of Appeals,
Eighth Circuit.

March Term, 1940.

Tuesday, April 30, 1940.

Phoenix Finance Corporation, Appellant,
No. 11,734. vs.
Iowa-Wisconsin Bridge Company, Appellee.

Appeal from the District Court of the United States for the Northern District of Iowa.

This matter comes before the Court upon the motion of appellant for advancement for hearing, for approval of

stipulation with respect to the record before this Court, and for enlargement of time for oral argument, the motion being supported by Mr. James R. Morford, and opposed by Mr. F. A. Ontjes, and the Court having considered the motion, the response thereto and the oral arguments of counsel, and being advised,

It is Ordered that said motion be and is hereby denied except that in lieu of a reprinting of the record on appeal in cause No. 11,055 (as a part of this record on appeal), appellant may file with the Clerk of this Court not less than six (6) additional copies of such printed record in cause No. 11,055.

April 30, 1940.

[fol. 863] (Order Denying Motion of Appellant For Suspension and Stay of Injunction, etc.)

United States Circuit Court of Appeals,
Eighth Circuit.

March Term, 1940.

Tuesday, April 30, 1940.

Phoenix Finance Corporation, Appellant,
No. 11,734. vs.
Iowa-Wisconsin Bridge Company, Appellee.

Appeal from the District Court of the United States for the Northern District of Iowa.

This matter comes before the Court on the motion of appellant for suspension and stay of injunction and for enlargement of order of District Court for a limited suspension and stay of injunction pending appeal, and upon the resistance thereto filed by appellee—Mr. James R. Morford appearing in support of the motion. and Mr. F. A. Ontjes in opposition thereto—and the Court being fully advised,

It is Ordered that said motion be and is hereby in all respects denied.

April 30, 1940.

[fol. 765] And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz.:

(Appearance of Mr. Casper Schenk as Counsel for Appellant.)

United States Circuit Court of Appeals,
Eighth Circuit.

Phoenix Finance Corporation, Appellant,
No. 11,734. vs.
Iowa-Wisconsin Bridge Company.

The Clerk will enter my appearance as Counsel for the Appellant.

CASPER SCHENK,
917 Des Moines Bldg.,
Des Moines, Iowa.

(Endorsed): Filed in U. S. Circuit Court of Appeals, May 20, 1940.

(Appearance of Mr. James R. Morford as Counsel for Appellant.)

The Clerk will enter my appearance as Counsel for the Appellant.

JAMES R. MORFORD,
829 Delaware Trust Building,
Wilmington, Delaware.

(Endorsed): Filed in U. S. Circuit Court of Appeals, May 22, 1940.

[fol. 766] (Appearance of Mr. Harold W. Norman as Counsel for Appellant.)

The Clerk will enter my appearance as Counsel for the Appellant.

HAROLD W. NORMAN.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jul. 17, 1940.

(Appearance of Mr. Fred A. Ontjes as Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the Appellee.

FRED A. ONTJES.

(Endorsed): Filed in U. S. Circuit Court of Appeals, May 9, 1940.

(Appearance of Mr. William C. Green as Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the Appellee.

WM. C. GREEN,
906 Pioneer Bldg.,
St. Paul, Minn.

(Endorsed): Filed in U. S. Circuit Court of Appeals, May 10, 1940.

[fol. 767] (Order of Argument.)

May Term, 1940.

Wednesday, September 18, 1940.

This cause having been called for hearing in its regular order, upon application in open court of Mr. James R. Morford, counsel for appellant, leave is by the Court granted to file motion for imposition of costs against appellee for infraction of Rule of Civil Procedure 75c. Argument is then commenced by Mr. James R. Morford for Appellant, and the hour for adjournment having arrived further argument of this cause is postponed until tomorrow morning.

(Order of Submission.)

May Term, 1940.

Thursday, September 19, 1940.

This cause having been called for further hearing, argument was continued by Mr. James R. Morford for appellant, by Mr. Fred A. Ontjes and Mr. William C. Green for

appellee and concluded by Mr. James R. Morford for appellant.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court, the briefs of counsel filed herein and on the motion for imposition of certain costs, with leave to counsel for appellee to file within five days their resistance to said motion.

[fol. 768] (Opinion.)

United States Circuit Court of Appeals,
Eighth Circuit.

No. 11,734.—October Term, A. D. 1940.

Phoenix Finance Corporation, a corporation of the State of Delaware,
Appellant,
vs.
Iowa-Wisconsin Bridge Company, a corporation of the State of Delaware,
Appellee.

Appeal from the District Court of the United States for the Northern District of Iowa.

[October 26, 1940.]

Mr. James R. Morford (Mr. Casper Schenk, Messrs. Marvel & Morford and Messrs. Zimmerman & Norman were with him on the brief) for appellant.

Mr. F. A. Ontjes and Mr. William C. Green for appellee.

Before Sanborn, Woodrough and Thomas, Circuit Judges.

THOMAS, Circuit Judge, delivered the opinion of the court.

This is an appeal from a decree entered upon a supplemental and ancillary bill of complaint granting an injunction and other relief intended to protect and effectuate the fruits of a prior decree and orders of the court below entered in a suit in which foreclosure of a Mortgage Trust Deed was denied.

Before analyzing the questions for decision we summarize the background of undisputed facts giving rise to the present controversy.

The appellee, Iowa-Wisconsin Bridge Company, herein called the Bridge Company, is a Delaware corporation. It owns a bridge across the Mississippi river between the states of Iowa and Wisconsin. In 1932 it gave a trust deed conveying all of its property to trustees to secure a $200,000.00 bond issue. The trustees named in the deed were the Bechtel Trust Company, now called First Trust and Savings Bank, an Iowa corporation, and A. H. Schubert, a citizen of Wisconsin. In 1933, the trustees filed a bill of foreclosure in the district court against the Bridge Company. A receiver was appointed in that suit. The Bridge Company answered. Fayette D. Kendrick, a stockholder in the Bridge Company, and other stockholders intervened on behalf of the defendant. Upon Kendrick's motion, the appellant, Phoenix Finance Corporation, a Delaware corporation, was by order of court joined as a party plaintiff and as a defendant to the petition of intervention. Appellant owned $177,600.00 par value of the bonds and was interested in upholding their validity. By order of court the petition of intervention was taken as an answer to the bill. The case was tried before a master who made findings of fact and conclusions of law. All parties filed exceptions to the master's report. After a hearing, the conclusions of the master were modified by the court. The court made findings of fact and conclusions of law, and a decree was entered thereon denying foreclosure. The appellant herein thereupon filed a motion for a rehearing and in the alternative for a modification

of the decree. The motion was overruled. See *Bechtel Trust Co., et al.* v. *Iowa-Wisconsin Bridge Co. (Kendrick, et al., Interveners)*, 19 F. Supp. 127.

The Trustees and Phoenix Finance Corporation, hereinafter called Phoenix, appealed to this court from the decree and from the order overruling the motion for rehearing and for modification of the decree, and the decree and orders of the court were affirmed. *First Trust & Savings Bank, et al.* v. *Iowa-Wisconsin Bridge Co. (Kendrick, et al., Interveners)*, 8 Cir., 98 F.2d 416; Cer. den. 305 U.S. 650; rehearing den. 305 U.S. 676.

In the Bill of Foreclosure the trustees alleged: "That all of said bonds were duly made and executed on behalf of the [Bridge] Company, * * * and that all of said bonds, together with interest coupons attached thereto evidencing interest thereon as aforesaid, have now been issued for a good and valuable consideration and are now outstanding in the hands of divers persons and corporations who are now the owners and holders thereof for value." They prayed that an account be taken of the amount due on the bonds and for a deficiency judgment.

The answer of the Bridge Company denied the validity of the deed of trust; alleged that there was a good defense to all or part of the bonds; and prayed that the plaintiffs be required to make a complete showing as to the consideration received by the Bridge Company in each and every instance for the delivery of the bonds. The petition of intervention prayed that the bill be dismissed and alleged that the bonds and mortgage were fraudulent, without consideration, invalid and void. Phoenix filed an answer to the petition of intervention denying all allegations of fraud.

The final decree contained the following pertinent statement: "That the mortgage and bonds in suit were fraudulently issued. That all bonds are without valid consideration, with the exception of the bonds aggregating $15,000 hereinafter specified."

In 1938 and 1939 Phoenix instituted five separate suits against the Bridge Company in the state courts of the state of Delaware based upon various of the items claimed to have constituted consideration for the bonds held to be invalid in the foreclosure case.

On September 18, 1939, the Bridge Company filed its supplemental and ancillary bill against Phoenix in the foreclosure proceeding reciting the history of the litigation and the commencement of the suits in the state courts of Delaware; alleging that all the matters involved in the cases in Delaware were adjudicated in the foreclosure suit and that Phoenix was threatening to institute and prosecute further actions against the Bridge Company upon similar alleged causes of action; and praying (1) for an injunction restraining Phoenix (a) from further prosecuting the suits already begun, and (b) from bringing further actions, and (2) for a decree commanding Phoenix to dismiss the suits already begun and to satisfy of record a certain $50,000.00 mortgage involved in the foreclosure suit and to surrender the notes purporting to be secured thereby.

The answer of Phoenix denies that the matters involved in the Delaware actions were adjudicated in the foreclosure suit, alleges that the Bridge Company is indebted to it in the sum of $98,349.46, that it is entitled to an accounting, that the findings and decree in the foreclosure suit are contrary to the facts and are the result of the tactics of the interveners and their counsel in the foreclosure suit in presenting a voluminous and confusing record and in making representations or inadvertent misrepresentations to the court, and that the validity of the bonds and the consideration received by the Bridge Company for them were not litigated but were reserved for determination at a second stage of the proceedings.

Parts of the answer were upon motion of appellee stricken, and the introduction of testimony contradicting the findings and decree in the foreclosure proceeding

was denied. The findings and decree were for the Bridge Company, and Phoenix appeals.

All the contentions on this appeal can be disposed of by determining (1) whether Phoenix was such a party to the foreclosure proceeding as that it is bound by the findings and decree entered therein; (2) whether the validity of the bonds and the consideration received for them were adjudicated in the foreclosure case, that is whether the decree in the foreclosure case affirmed by this court is *res judicata* of the controversies involved in the supplemental and ancillary proceedings; (3) whether the injunction is a violation of section 265 of the Judicial Code and of the Fifth Amendment to the Constitution; and (4) whether the burden was upon appellee to show that the decree in the foreclosure was a "right" one and not obtained by fraud.

1. Phoenix contends that the decree in the foreclosure case, affirmed by this court, does not constitute an adjudication against it for the reasons (1) that it was only a formal party to that suit and (2) that it was not represented in that proceeding by the trustees.

On the issue here presented it is unnecessary to consider the technical capacity of Phoenix as a party in the foreclosure suit. The only question is whether its relation to that suit was such that it is bound and concluded by the decree. We think it is. Even though its name had not appeared on the record at all as a party to the case it was not, in a legal sense, a stranger to the cause. Phoenix as the owner of about ninety per cent. of the bonds, acting within its express rights under the trust deed, requested the trustees to institute the foreclosure suit. The suit was begun and prosecuted by attorneys selected and paid by it. When the validity of the bonds was attacked by the answer and the petition of intervention it participated in the trial and in the proceedings. It filed an answer to the petition of intervention. It filed exceptions to the master's report and a petition for rehearing and modification of the decree; and it ap-

pealed to this court. The validity of the bonds held by it was challenged on the grounds of fraud and want of consideration and it had a direct interest in defending them. Its counsel did defend them with exceptional ability.

On this point the case is within the principle "that one who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own, and who does this openly to the knowledge of the opposing party, is as much bound by the judgment and as fully entitled to avail himself of it as an estoppel against an adverse party, as he would be if he had been a party to the record." *Souffront* v. *Compagnie Des Sucreries,* 217 U.S. 475, 487; *Anderson* v. *Watt,* 138 U. S. 694, 704-5; *Robbins* v. *Chicago City,* 4 Wall. 657, 71 U.S. 657, 672; *Lovejoy* v. *Murray,* 3 Wall. 1, 70 U.S. 1, 19; *Hoskins* v. *Hotel Randolph Co.,* 206 Iowa 932, 211 N.W. 423, 427. And when a party takes an active part in litigation in a federal court and its rights are there determined on the merits, "that court has power to protect its decree in any action which such litigant may take in another court." *Riverdale Cotton Mills* v. *Alabama and Georgia Manufacturing Company,* 198 U.S. 188, 195, 196-7.

2. The dispute next turns upon the effect to be given the decree in the foreclosure suit. In considering this issue it should be observed that it has long been the rule in the national courts "that a former judgment between the same parties (or their privies) upon the same cause of action as that stated in the second case constitutes an absolute bar to the prosecution of the second action, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Werlein* v. *New Orleans,* 177 U.S. 390, 397; *Chicot County Drainage Dist.* v. *Baxter State Bank,* 308 U.S. 371, 378; *Davis* v. *Brown,* 94 U.S. 423. It is only when a suit is upon a different cause of action, but be-

tween the same parties, that a judgment in the former action operates as an estoppel in the latter only as to every point and question which was actually litigated and determined and is not conclusive as to other matters which might have been, but were not litigated or decided. *Union Central Life Ins. Co.* v. *Drake,* 8 Cir., 214 F. 536, 542; *Cromwell* v. *County of Sac,* 94 U.S. 351. These rules have been consistently followed by this court. See *Handlan* v. *Walker,* 8 Cir., 200 F. 566, 568; *Dickinson* v. *Orr,* 8 Cir., 94 F.2d 536, 539; *Guettel* v. *United States,* 8 Cir., 95 F.2d 229, 232; *Badger Dome Oil Co.* v. *Hallam,* 8 Cir., 99 F.2d 293, 296; *George H. Lee* v. *Federal Trade Commission,* 8 Cir., 113 F.2d 583, 585.

In this case the parties are the same. The only question relates to whether the matters and things litigated are the same. In the case of *Toucey* v. *New York Life Insurance Co.,* 8 Cir., 102 F.2d 16, 20, we said: "But although the methods of presenting and determining controversies and the facts on which they arise may sometimes differ in equity and in law, so long as the identity of the controversies can be discerned, the adjudication in one court concludes them." And in *Union Central Life Ins. Co.* v. *Drake, supra,* this court said, "the true test of the identity of causes of action is the identity of the facts essential to maintain them."

It is necessary, therefore, to define the issues tried and determined in the foreclosure suit in order to determine whether the controversies pleaded in the supplemental and ancillary bill can be identified with the controversies adjudicated in the foreclosure decree.

It is urged that in a foreclosure suit the validity of the trust deed only is in issue and the validity of the bonds and the consideration given for them, or the question of fraud inhering in them, are to be determined in a subsequent proceeding. The short answer is that the trustees and Phoenix as well as the Bridge Company elected to litigate all these matters in the foreclosure proceedings,

and having done so all parties are bound by the scope of that decree.

It is well settled that in the foreclosure of a mortgage or deed of trust two issues are usually tendered by the plaintiff. First he asks for the foreclosure of the mortgage lien and the sale of the security and, second, he asks to have the amount of the secured debt established and for a deficiency judgment. The first is an equitable issue and the second a legal one, but the court of equity having taken jurisdiction determines them both. In the foreclosure suit here involved the trustees, acting under the authority expressly conferred upon them by the trust deed, selected a court of equity and therein demanded both remedies. The answer and the petition of intervention traversed both issues, alleging as to both the trust deed and the bonds that they were fraudulently issued. The petition of intervention was more specific and pointed out the nature of the fraud. It alleged that Phoenix and the Bridge Company were dominated and controlled by the same officers; that those common officers in violation of their fiduciary duties to the Bridge Company fraudulently issued the trust deed and the bonds to themselves or to corporations controlled by them for the purpose in brief of fraudulently obtaining ownership of the Bridge Company's property without consideration. Phoenix denied these allegations.

Upon the issues thus joined the burden was on the interveners and the Bridge Company to show such domination and common control. This having been done the burden then rested upon Phoenix, holder of the bonds, and the trustees to show entire fairness in the transaction, including a fair consideration for the bonds. *Geddes* v. *Anaconda Mining Co.*, 254 U.S. 590, 599. It was upon these issues that the case was tried, and Phoenix, as owner of nearly all the bonds, and its officers and attorneys took an active part. Had they been able in that suit to show that a fair consideration had been paid for the bonds and that the Bridge Company had had the benefit of such

consideration all other elements of fraud would have been comparatively trivial. As said in the opinion of this court on the appeal in the foreclosure suit, "The important issue in the case is the question of the sufficiency of the consideration for the $177,600 of bonds issued to Phoenix." A mass of evidence was introduced upon that issue, and the court found against Phoenix, declared its bonds invalid and without consideration, and denied foreclosure. In our opinion on the first appeal we summarized the consideration claimed by Phoenix and the trustees to have been paid for the bonds as follows, and it will be found convenient for reference in considering the issue of *res judicata* here:

To Phoenix in consideration of

1.	In exchange for its mortgage dated March 10, 1931,		
	Principal of mortgage	$50,000.00	
	Accrued interest	3,548.56	
	Allowance to give 8% yield on bonds	12,727.31	
			$ 66,275.87
2.	For advancements under guaranty contract of November 10, 1930,		
	To Industrial Contracting Co.	10,000.00	
	To McClintic-Marshall Co.	11,262.71	
			21,262.71
3.	Paid Kramer & Hogg to discharge mechanic's lien		9,000.00
4.	Cash		461.42
5.	In exchange for 517 shares of bridge company stock with accrued interest		60,500.00
6.	As security for		
	Payment of taxes	$ 3,125.00	
	Advancements	14,610.19	
		$17,735.19	20,100.00

To attorneys as security for fee of	4,000.00	10,000.00
To Anderson for claim of	6,000.00	7,400.00
To five claimants for	5,000.00	5,000.00
	$15,000.00	
		$200,000.00

With the foregoing rules and the situation described in mind we turn to the controversies alleged in the supplemental and ancillary bill to determine whether or not they may be identified with the facts which were or which might have been adjudicated in the foreclosure decree.

(a) In the supplemental and ancillary bill it is charged, and the answer admits, that in September, 1938, Phoenix filed an action in the Superior Court of Delaware against the Bridge Company in which the alleged cause of action is based upon two promissory notes, one for $2,000.00 dated December 15, 1932, and one for $3,125.00 dated January 20, 1933; and the Bridge Company claims that these notes were involved in and were adjudicated in the foreclosure suit.

The record in the foreclosure suit shows that the $2,000.00 note was a part of the sum of $14,610.19 designated as "Advancements" in item 6 of the foregoing summary, and that the $3,125.00 note is the same as the first entry of item 6, referred to as "Payment of taxes". For the total alleged indebtedness under item 6 in the amount of $17,735.19 bonds in the sum of $20,100.00 were issued to Phoenix. All the claims included in item 6 were considered in the master's report to which exceptions were filed by Phoenix, the Bridge Company and the interveners. The court considered all the exceptions filed by all the parties and decreed "that all bonds are without consideration, except the bonds aggregating $15,000.00 referred to hereafter."

Phoenix contends that the decree is wrong with respect to these items; that the record shows that the sums of

$3,125.00 and $2,000.00 were actually advanced to the Bridge Company, and that the court without the pleading of a counterclaim or off-set balanced against them $14,000.00 which Phoenix owed the Bridge Company for stock fraudulently issued to and held by Phoenix. The claims urged here were all asserted in the foreclosure suit without avail and upon appeal to this court the decree was affirmed. The merits of that controversy can not be reexamined in this collateral attack upon the decree. *Root* v. *Woolworth*, 150 U.S. 401, 414. The adjudication is final and conclusive.

A similar contention was presented to this court in the case of *Thornton* v. *Carter*, 8 Cir., 109 F.2d 316, and we there said at page 320 of the report, citing numerous authorities, that "If a judgment or decree of this court which disposes of a case on the merits has become final, no purpose can be served by considering whether it is right or wrong. A judgment which is wrong, but unreversed, is as effective as a judgment which is right." In *Cooper* v. *Reynolds*, 10 Wall. 308, 77 U.S. 308, the Supreme Court said: "It is of no avail * * * to show that there are errors in the record [in a former suit], unless they be such as to prove that the court had no jurisdiction of the case, or that the judgment rendered was beyond its power. This principle * * * takes rank as an axiom of the law." See also *Manson* v. *Duncanson*, 166 U.S. 533, 547.

(b) It is next charged that in February, 1939, Phoenix commenced a suit against the Bridge Company in the Court of Chancery of Delaware seeking to recover 517 shares of stock of the Bridge Company which were surrendered and cancelled at the time Phoenix fraudulently procured the issuance to it of $60,500 of bonds (referred to as item 5 in the foregoing summary), which shares the court in the foreclosure suit found and decreed Phoenix was not entitled to have reissued to it. Phoenix admits the commencement of such a suit but contends that there was no issue in the foreclosure suit as to the right of Phoenix to get back the 517 shares of stock.

In the foreclosure suit it was found that the entire transaction involving the exchange of 517 shares of stock for bonds was fraudulent. After the decree in that case was rendered Phoenix filed a petition for rehearing and modification of the decree in which it prayed that the decree be so modified as to reinvest in it the 517 shares of stock. The court denied the petition and this court affirmed.

In the opinion of this court (98 F.2d at p. 428) we said with reference to this matter, "In refusing to modify the decree to require the Bridge Company to return to Phoenix 517 shares of stock surrendered in exchange for bonds the court invoked the maxim that 'He who hath done iniquity shall not have equity.' * * * In the present case the district court adopted the view that all of the transactions leading up to the issuance of the bonds were steps in a single fraudulent enterprise to obtain ownership of the bridge after a foreclosure. * * * Having determined that the appellants had no standing to maintain their suit, the district court had neither the right nor the duty to compel the bridge company to restore what it had received from the bondholders. This is not a case in which the defrauded party is suing to rescind. Here the fraud has been pleaded only as a defense. * * * when the wrongdoer as plaintiff is attempting to enforce the tainted contract he is turned out of court empty handed." Citing authorities.

The question for determination is whether the denial of a restoration under the "clean hands doctrine" by a court having jurisdiction is *res judicata* or whether the wrongdoer may in a separate suit go into another court and recover the property used by him in perpetrating the fraud denounced by the court which denied restoration. If he may do so it would seem that the clean hands doctrine is only a bother, putting litigants to much useless trouble and expense. No authority has been cited to sustain such a practice. In *Root* v. *Woolworth, supra*, the Supreme Court said, "The jurisdiction of courts of equity to interfere and effectuate their own decrees by injunctions or writs of assistance in order to void the relitigation of

questions once settled between the same parties is well settled." One who fraudulently procures a conveyance may not defeat the defrauded grantor, nor protect himself from the consequences of his fraud, by bringing a suit for restoration in another jurisdiction from the one in which his fraud was adjudged. He is concluded by the first judgment. *Independent Coal & Coke Co.* v. *United States,* 274 U.S. 640.

(c) In June, 1939, Phoenix brought another action in the Superior Court of Delaware against the Bridge Company upon a promissory note for $500.00 and another note for $12,110.19, and also upon two claims, one for $15,000.00 and one for $7,000.00. The two notes formed part of the alleged consideration for the issuance of $20,100.00 of bonds, referred to in item six of the foregoing summary. They are governed by the considerations discussed in paragraph (a) above. The claim for $15,000.00 is a mere restatement of the claim on the notes in different form and in the alternative. The claim for $7,000.00 is a claim for interest on the notes. All these claims are sufficiently identified with the controversy adjudged in the foreclosure suit. The decree in that suit concludes them all.

(d) In June, 1939, Phoenix brought another suit against the Bridge Company in the Superior Court of Delaware for $21,262.71 based upon a guaranty agreement dated November 10, 1930. This claim is scheduled under item 2 in the foregoing summary. It is made up of the same items. They were considered in the foreclosure suit and the court found the guaranty agreement to be without consideration, fraudulent and void. The court found that the claimed advancement for the Bridge Company had not been made by Phoenix. Clearly these claims were litigated in the foreclosure suit, and that judgment is conclusive upon the parties.

(e) Another suit in the Delaware court brought by Phoenix against the Bridge Company is based upon two bonds of the face value of $500.00 each. It is admitted that these bonds are a part of those issued to Anderson

(referred to in the foregoing summary) in the total amount of $7,400.00 for a debt of $6,000.00. The court below in the foreclosure suit found that they were valid to the extent of the consideration paid for them by Anderson and invalid for all in excess of that amount. Payment of the amount found to be due was ordered.

The issuance of these bonds was a part of the entire fraudulent scheme to which the officers of Phoenix were parties. They can be paid only in the manner provided in the decree in the foreclosure suit. Equity will follow them until they come into the hands of an innocent purchaser for value. Even then the wrongdoer could not acquire them free from the obligation imposed upon them by the court. Phoenix having been a party to the fraud cannot be an innocent purchaser for value no matter when it acquired title. *Independent Coal & Coke Co.* v. *United States, supra,* at page 647. The adjudication is binding upon it.

(f) Item 1 of the foregoing summary shows that upon the trial of the foreclosure suit Phoenix accounted for $66,275.87 of the consideration claimed to have been given for the bonds of the Bridge Company issued to it by an exchange of bonds for a mortgage on the property of the Bridge Company dated March 10, 1931, in the principal amount of $50,000.00 and accrued interest and allowance to give an 8% yield on the bonds.

After hearing and considering the evidence in respect of this mortgage the court below in the foreclosure suit found that it was fraudulently issued; "That in truth and in fact no indebtedness of said Bridge Company to the Phoenix Finance System, Inc., existed and the Bridge Company received no consideration for the execution of said mortgage; that the same was and is wholly without consideration, fraudulent and void. At said time [March 10, 1931] said Thompson caused entries to be made on the books of said Bridge Company purporting to show receipt of $50,000 in cash, whereas, in truth and in fact, said amount and no part thereof was received by the Bridge Company."

In its petition for a rehearing or in the alternative for a modification of the decree, Phoenix prayed "that the decree be modified so as to withhold from adjudication the question of the validity of the $50,000 mortgage given by the bridge company to petitioner, reserving the right to petitioner to litigate said mortgage in another action, if it so desires." The petition was denied and this court affirmed.

In the supplemental and ancillary bill the Bridge Company alleges that in 1939 Phoenix caused this mortgage to be recorded, thereby wrongfully causing said mortgage to cast a cloud upon the title to its property; and it prayed that Phoenix be required to surrender the original mortgage and any purported notes secured thereby. The prayer was granted.

Phoenix would relitigate the validity of this mortgage. Its position is that the $50,000 note secured by the mortgage was not introduced in evidence in the foreclosure suit nor was it in issue and, therefore, was not adjudicated. It is not claimed that there was a different consideration for the note than the consideration for the mortgage, which was held to be fraudulent and non-existent. There can be no merit in such a contention. The entire transaction was decreed to be fraudulent and without consideration. The decree is conclusive. "A successful defense on the merits in an action either on the principal debt or the collateral will bar an action on the other." 34 C.J. 853.

In this proceeding the court further found that Phoenix is threatening to prosecute further actions in the courts of Delaware against the Bridge Company on causes of action based upon the alleged consideration for the bonds involved in the foreclosure suit; and the decree enjoined Phoenix, its officers, agents, servants, employees and attorneys from commencing or carrying forward any suits or causes of action involved in or determined in the findings of fact and conclusions and decree dated December 1, 1936 [in the foreclosure suit], and order denying petition

for rehearing and modification of decree filed March 4, 1937.

The decree was proper and necessary to secure to the Bridge Company the full benefit of the decree and orders in the foreclosure suit.

3. It is claimed on this appeal that the injunction granted is in violation of section 265 of the Judicial Code and that it results in a denial of the rights of Phoenix guaranteed by the Fifth Amendment to the Constitution. These contentions may be considered together because unless the decree violates section 265 it does not deprive Phoenix of any of its constitutional rights.

The pleading by which the Bridge Company invoked the jurisdiction of the district court in this proceeding is without doubt a supplemental and ancillary bill in equity, intended to effectuate the adjudication and orders made by the same court in the foreclosure suit. In *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 239, the Supreme Court said: "That a federal court of equity has jurisdiction of a bill ancillary to an original case or proceeding in the same court, whether at law or in equity, to secure or preserve the fruits and advantages of a judgment or decree rendered therein, is well settled. (Citing authorities) * * * The proceeding being ancillary and dependent, the jurisdiction of the court follows that of the original cause, and may be maintained without regard to the citizenship of the parties or the amount involved, and notwithstanding the provisions of §265 of the Judicial Code, U.S.C., Title 28 §379." Citing authorities. The leading authorities upon this proposition are collected in the opinion of this court in *Toucey* v. *New York Life Ins. Co.*, 8 Cir., 102 F.2d 16, at page 23 of the report. See also *Julian* v. *Central Trust Co.*, 193 U.S. 93, 112. This contention is without merit.

4. Phoenix contends that by a recognized application of the equitable maxim that "He who seeks equity must do equity", the Bridge Company by its bill of complaint supplemental and ancillary to the decree in the foreclosure

suit was required to show that such decree was a "right" decree and that Phoenix was entitled to show that such decree should not be implemented.

In support of this contention counsel cite Pomeroy on Equity Jurisprudence, Vol. 1 (3d Ed.) sec. 388; *Union Central Life Ins. Co.* v. *Drake,* 8 Cir., 214 F. 536, 538; *United States* v. *Debell,* 8 Cir., 227 F. 775, 779; and *Levy* v. *Kress,* 8 Cir., 285 F. 836, 839. These authorities fall far short of supporting the contention of Phoenix. They place no such burden upon the victim of a wrongdoer when he attempts to secure the fruits of a former judgment against such wrongdoer. The principle of the authorities relied upon is stated in the *Levy case, supra,* to be—"that he who seeks equity must do equity, and in a case in which the rules and principles of equity demand it a court of chancery may condition the grant of relief sought from it by a party to a suit, with the enforcement of a claim or an equity held by the opposing party, although by reason of the statute of limitations, or by reason of a former judgment or otherwise, the latter could not enforce his claim in any other way." The principle thus stated is not in conflict with the "clean hands doctrine", which is also a venerable principle of equitable jurisprudence. It purports to apply only where "the rules and principles of equity demand it", not where it would defeat some salutary principle of equity. As shown in the authorities relied upon by appellant restoration is granted in a subsequent suit only where the parties to the transaction were in *pari delicto,* or where the successful party in the first suit was at fault in regard to the particular item sought to be recovered, or where the unsuccessful party was not at fault. The rule is applied generally for the protection of innocent parties and not for the benefit of parties whose hands were found to be unclean in the first suit. Compare *Thornton* v. *Carter, supra.*

In further support of this contention Phoenix relies upon a rule stated by Lord Redesdale in *Hamilton* v. *Houghton,* 2 Bligh. 169, 4 Eng. Reprints 290, as follows:

"The party who comes into a court of equity to have the benefit of a former decree must show that it was a right decree, if the decree appears to be erroneous, the Court cannot carry it into execution."

The foregoing rule is applicable only in cases where a party is seeking to modify or enlarge an incomplete decree and then to enforce it. In such a case the entire cause may be reexamined to determine the existence of equitable grounds for relief. *Lawrence Manufacturing Company* v. *Janesville Cotton Mills,* 138 U.S. 552, 561; *Gay* v. *Parpart,* 106 U.S. 679, 699; *O'Brien* v. *Wheelock,* 184 U.S. 450, 483; *Utah Power & Light Co.* v. *United States,* Ct. of Cl., 42 F.2d 304, 308; *Kimen* v. *Atlas Exchange Nat. Bank of Chicago,* 7 Cir., 92 F.2d 615, 617; *Compton* v. *Jesup,* 6 Cir., 68 F. 263, 294, 315. In *Compton* v. *Jesup, supra,* Chief Justice Taft (then Judge Taft) states the rule as follows: "where the aid of a court of equity is invoked to enforce or 'piece out' (as the phrase is) an incomplete decree of another or the same court, the court appealed to may examine the justice of the decree sought to be enforced, and may refuse its aid, if it finds the decree inequitable, or may impose, as a condition of its granting relief, any variation or limitation with respect to the operation of the decree which justice and equity may require."

Obviously, the rule has no application in the instant case. The Bridge Company is not seeking to "piece out" an incomplete decree and then to enforce it. All that is sought here is the benefit of the fruits of a decree affirmed by this court. That decree is conclusively presumed to be correct. If it were otherwise there could be no end to litigation, the rule of the finality of judgments would have no efficacy, and the doctrine of *res judicata* would be anulled.

There remains for consideration the question of the fraud alleged to have been practiced by counsel for the interveners in the foreclosure suit. In response to the supplemental and ancillary bill of the Bridge Company

Phoenix filed an answer and counterclaim in which it asserted the right to litigate the validity of the various items of consideration given by it for the bonds of the Bridge Company. As a ground for this claimed right Phoenix alleged that "To the extent that the findings of this Court as entered December 1, 1936, and its decree are inconsistent with the foregoing allegations, the said findings and decree are contrary to the facts and are the result of the tactics of the interveners and their counsel in the trial of the foreclosure proceedings, first, in presenting to this Court a voluminous record consisting largely of testimony and exhibits relating to immaterial and irrelevant issues, so confused, ambiguous and disorderly as to make it difficult, if not impossible, for the Court to ascertain the facts and to compel the Court to rely upon the representations of counsel, and second, in making false representations or inadvertent misrepresentations with respect to" certain of the alleged items of consideration for the bonds.

Phoenix alleged further that it had not had its day in court for the reason that it believed "that the question of the validity of the bonds or the consideration received by the Bridge Company therefor was reserved for a second stage of the proceedings"; and that this belief was founded in part upon the prevailing practice with respect to foreclosure proceedings in United States courts and in part upon an apparent ruling of the Master that such would be the procedure before him.

Upon motion of counsel for the Bridge Company these allegations of the answer and counterclaim were stricken on the ground stated in the order of the court that "Phoenix Finance Corporation is clearly endeavoring to relitigate questions of fact and law which were fully litigated and opportunity given to litigate on the trial of the principal case, in which trial and decision all accounts, indebtedness and matters entering into the consideration of the issue of each and all of the bonds secured by the mortgage sought to be foreclosed were in question, and were considered and determined."

The court, we think, fairly stated the situation presented by the record and the pleadings. Phoenix, in effect, sought to annul the findings and decree of the court in the foreclosure proceeding on account of the assumed neglect or misapprehension of the issues by its own counsel and counsel for the trustees in matters arising on the trial. This it cannot do for two reasons.

First, Phoenix could not by a direct proceeding have impeached the former decree for this alleged fraud, because, even if it were sufficient to invalidate that decree, no valid reason is shown why such fraud was not interposed and brought to the attention of the court in the foreclosure suit; and having failed to present these matters at the proper time it cannot collaterally attack the decree in an answer and counterclaim in this ancillary proceeding. *Root* v. *Woolworth, supra.*

Second, if indeed these allegations may be said to constitute fraud at all, such fraud adhered in the trial of the foreclosure suit and is not a ground for annulling the decree. It was said by the Supreme Court in *United States* v. *Throckmorton*, 98 U.S. 61, 68, that "the acts for which a court of equity will on account of fraud set aside or annul a judgment or decree, between the same parties, rendered by a court of competent jurisdiction, have relation to frauds, extrinsic or collateral, to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered." See *Atchison, T. & S. F. Ry. Co.* v. *United States,* 8 Cir., 106 F.2d 899, 903; *Continental Nat. Bank* v. *Holland Banking Co.,* 8 Cir., 66 F.2d 823, 830.

Aside from these rules of equity which in addition to the reason assigned by the court below justify the order striking the allegations from the answer and counterclaim, the facts pleaded do not constitute fraud. Voluminous, ambiguous and disorderly testimony offered and received on a trial, if permitted, is not a fraud upon a party participating in the trial. His counsel has every opportunity to analyze the testimony for the court. The same thing is true in respect of an "inadvertent mis-

representation'' of counsel as to the issues. His opponent being present he should at the time call such matters to the attention of the court. Neither is a misconception of the law controlling the issues by counsel for either party a fraud upon his client for which equity can or will give relief in a subsequent proceeding to enforce the judgment against him. The court did not err in striking the allegations of fraud from the answer and counterclaim.

The decree appealed from is

Affirmed.

[fol. 791] (Order Denying Motion of Appellant for Imposition of Costs Against Appellee, etc.)

October Term, 1940.

Saturday, October 26, 1940.

At the time of oral argument of this case, appellant filed, by leave of this Court, a motion for imposition of costs against appellee for infraction of Rule 75 (e) of the Rules of Civil Procedure adopted by the Supreme Court of the United States pursuant to the Act of Congress of June 19, 1934. Said motion has been considered by the Court, and It is now here ordered that the same, be, and is hereby, denied.

October 26, 1940.

(Decree.)

United States Circuit Court of Appeals,
Eighth Circuit.

October Term, 1940.

Saturday, October 26, 1940.

Phoenix Finance Corporation, a corporation of the State of Delaware, Appellant,

No. 11,734. vs.

Iowa-Wisconsin Bridge Company, a Corporation.

Appeal from the District Court of the United States for the Northern District of Iowa.

[fol. 792] This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Iowa, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court, in this cause be, and the same is hereby, affirmed with costs; and that the Iowa-Wisconsin Bridge Company, a Corporation, have and recover against the Phoenix Finance Corporation, a corporation of the State of Delaware, the sum of Twenty Dollars for its costs herein and have execution therefor.

October 26, 1940.

[fol. 834] (Order Denying Petition for Rehearing.)

October Term, 1940.

Saturday, November 16, 1940.

The petition for rehearing filed by counsel for appellant in this cause having been considered, It is now here ordered by this Court that the same, be, and it is hereby, denied.

November 16, 1940.

(Motion of Appellant for stay of Mandate Pending Application to the Supreme Court of the United States for Writ of Certiorari.)

To the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit or any Judge Thereof:

Now Comes Phoenix Finance Corporation, the appellant, by James R. Morford, one of its attorneys, and respectfully shows to the Court:

1. That an order denying the appellant's petition for rehearing was entered in the above stated cause on the 16th day of November, 1940, and accordingly, pursuant to Rule 19 (2) of the Rules of the United States Circuit Court of Appeals for the Eighth Circuit, the mandate to the District Court in this cause will, unless stayed, be issued on the 27th day of November, 1940.

[fol. 835] 2. That it is the intention of the appellant to petition the Supreme Court of the United States for a writ of certiorari in this cause, and counsel for the appellant is now engaged in the preparation of such petition for writ of certiorari and a brief in support thereof. After said petition and supporting brief are prepared, it will be necessary to have the same printed in conformity with the Rules of the Supreme Court of the United States. The necessary preparation and printing of the petition and supporting brief cannot be accomplished before the 27th day of November, 1940.

3. The appellant has ordered from the Clerk of the United States Circuit Court of Appeals for the Eighth

Circuit a certified transcript of the record, with the necessary additional printed copies thereof, for filing in the Supreme Court of the United States as soon as said petition and supporting brief are completed and printed.

Wherefore, your petition prays, in conformity with Rule 19 (3) of the Rules of the United States Circuit Court of Appeals for the Eighth Circuit, that the mandate of this Court in the above stated cause to the District Court of the United States for the Northern District of Iowa be stayed for a period of thirty days pending application to the Supreme Court of the United States for certiorari and, if certiorari be granted, until final disposition of said cause in the Supreme Court of the United States.

JAMES R. MORFORD.
Address: Delaware Trust Building,
Wilmington Delaware.
Attorney for Appellant,
Phoenix Finance Corporation.

[fol. 836] State of Delaware,
New Castle County—ss.:

James R. Morford being duly sworn deposes and says that he is one of the attorneys for Phoenix Finance Corporation, appellant in the above entitled cause; that he has read the foregoing motion, and that the facts set forth therein are true as he verily believes.

JAMES R. MORFORD.

Subscribed and sworn to before me by the said James R. Morford, this 18th day of November, A. D. 1940.

(Seal) R. M. FITZPATRICK,
Notary Public.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Nov. 19, 1940.

(Order Staying Issuance of Mandate.)

November Term, 1940.

Tuesday, November 19, 1940.

On Consideration of the motion of appellant for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed [fol. 837] with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

November 19, 1940.

[fol. 838] (Clerk's Certificate.)

United States Circuit Court of Appeals,
Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing transcript composed of two volumes, Volume I consisting of pages a to 480, inclusive, and Volume II consisting of pages 481 to 839, inclusive, contains the transcript of the record from the District Court of the United States for the Northern District of Iowa as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein the Phoenix Finance Corporation, a Corporation of the State of Delaware, was Appellant, and the Iowa-Wisconsin Bridge Company, a Corporation, was Appellee, No. 11734, as full, true and complete

as the originals of the same remain on file and of record in my office.

I do further certify that a copy of the printed record in the case of First Trust and Savings Bank and A. H. Schubert, as Trustees, and Phoenix Finance Corporation, Appellants, vs. Iowa-Wisconsin Bridge Company, a corporation, Defendant, and Fayette D. Kendrick, Warren G. Hayes, Anna W. Schuster, T. H. Bakewell and Ernest W. Haverland, Interveners, Appellees, No. 11,055, referred to in the order of the United States Circuit Court of Appeals at page 764 of this printed record, consisting of [fol. 839] Volumes I to V and paged from a to 1686, inclusive, and also separate volume "Supplemental Transcript of Record", paged from 1 to 61, inclusive, and upon which said cause was heard and determined by said Circuit Court of Appeals is herewith transmitted to the Supreme Court of the United States.

I do further certify that there is also transmitted herewith to the Supreme Court of the United States Volume VI "Transcript of Record" in said cause No. 11,055, paged from 1687 to 1718, both inclusive, containing proceedings in said Circuit Court of Appeals in said cause No. 11,055.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this 26th day of November, A. D. 1940.

(Seal)

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

[fol. 840] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 20, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted, and the case is assigned for argument immediately following No. 587.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 841] IN THE SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO RECORD—Filed January 31, 1941

It Is Stipulated And Agreed by and between James R. Morford, one of the attorneys for Phoenix Finance Corporation, petitioner, and Fred A. Ontjes, one of the attorneys for Iowa-Wisconsin Bridge Company, respondent in the above stated cause, subject to the approval of the Court, as follows:

That the printed copies of the record, in the cause in the Circuit Court of Appeals of the United States for the Eighth Circuit entitled "First Trust and Savings Bank and A. H. Schubert, as Trustees, and Phoenix Finance Corporation, Appellants, vs. Iowa-Wisconsin Bridge Company, a corporation, defendant, and Fayette D. Kendrick, Warren G. Hayes, Anna W. Schuster, T. H. Bakewell and Ernest W. Haverland, Interveners, Appellees," the same being No. 11055 in equity in said court and being the same record filed in the Supreme Court of the United States on former petition for certiorari (No. 438 October Term 1938) as heretofore filed in the Supreme Court of the United States by the petitioner in connection with petition for writ of certiorari, shall be deemed a sufficient compliance with Rule 38, para-
[fol. 842] graph 7, of the Rules of the Supreme Court of the United States with respect to the printing of additional copies of the record after the granting of writ of certiorari.

James R. Morford, Attorney for Phoenix Finance Corporation, Petitioner. Fred A. Ontjes, Attorney for Iowa-Wisconsin Bridge Company, Respondent.

January 27, 1941.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 624

PHOENIX FINANCE CORPORATION, A CORPORATION OF THE STATE OF DELAWARE,

Petitioner,

vs.

IOWA-WISCONSIN BRIDGE COMPANY, A CORPORATION OF THE STATE OF DELAWARE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JAMES R. MORFORD,
Counsel for Petitioner.

CASPER SCHENK,
Of Counsel.

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1 Freeman on Judgments, 5th Ed., Sec. 337, p. 674	34
17 Fletcher's Cyclopedia on Private Corporations (1933) p. 396	45
High on Injunctions, Sec. 89	42
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5 Pomeroy's Equity Jurisprudence (4th Ed.), Sec. 2059, pp. 4650-4651	43
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Foreword.

It is stated in "Jurisdiction of the Supreme Court of the United States" by Robertson and Kirkham, Sec. 29, p. 559, that it is "not uncommon for the Supreme Court to withhold its ruling upon a petition for certiorari until the happening of intervening events shall have assisted in a determination of the question whether the writ should issue."

The decision of the Circuit Court of Appeals for the Eighth Circuit, for the review of which the within petition is filed, is opposed on the same facts to the decision of the Superior Court of Delaware. *See Summary Statement (b)*, 1, p. 7, *infra*, *Phoenix Finance Corporation* v. *Iowa-Wisconsin Bridge Company*, 14 Atl. (2d) 386.

Writ of error to the Supreme Court of Delaware in the case is pending and will be argued at the January Term, 1941. *See Clerk's Certificate attached as an addendum hereto.*

The Supreme Court, in accordance with the principle above stated, has withheld action upon petition for certiorari until decision by State courts indicate whether review is warranted. Thus, in *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 53 S. Ct. 98, it appears (footnote p. 163, 287 U. S., p. 100, 53 Sup. Ct.) that the petition, although filed October 30, 1931, was not granted until April 25, 1932, 286 U. S. 536, 52 S. Ct. 499, action thereon being withheld "awaiting the action of the Supreme Court of Idaho in the matters pending before it." Journal Sup. Ct., October Term 1931, p. 163 (Jan. 11, 1932).

Although it does not appear from the report, *Robertson and Kirkham, supra* (p. 560), have cited *Michalek v. United States Gypsum Co.*, 298 U. S. 639, 56 S. Ct. 679, as another case where "action on the application for certiorari was withheld several months for a decision of a state supreme court on a controlling question of law." In that case, it

appears that the decision of the highest court of New York (270 N. Y. 287, 200 N. E. 824) being contrary to the result reached by the Federal court as to one of the causes of action, certiorari was there granted and the judgment reversed *per curiam*, as to that cause of action, upon the authority of the decision of the New York Court of Appeals.

By the prayers of the within petition (p. 19), the petitioner has asked this Court to "withhold its ruling * * * until the determination by the Supreme Court of the State of Delaware" of the pending writ of error.

The above is not to be construed as an admission by the petitioner that this petition for writ of certiorari should be denied in the event the Supreme Court of Delaware should reverse the Superior Court. The petitioner stands upon the merits of its petition regardless of the outcome of the writ of error pending in the Supreme Court of Delaware.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 624

PHOENIX FINANCE CORPORATION, A CORPORATION OF THE STATE OF DELAWARE,

Petitioner,

vs.

IOWA-WISCONSIN BRIDGE COMPANY, A CORPORATION OF THE STATE OF DELAWARE.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Phoenix Finance Corporation respectfully represents:

I.

Summary Statement of the Matter Involved.

It is essential to a proper understanding of the matter involved that the Court consider and be cognizant of the factual and procedural status of *both* of two litigated causes below, *i. e.*, the "Foreclosure Cause" and the "Supplemental and Ancillary Cause" hereinafter mentioned. The

intervening facts, claimed as the inducement for the second or Supplemental and Ancillary Proceeding, are separately summarized.

(a) The Foreclosure Cause.

Deed of Trust Foreclosure Cause as an original proceeding in the United States District Court for the Northern District of Iowa. Original parties: *First Trust & Savings Bank (an Iowa corporation) and Schubert (a citizen of Wisconsin), Trustees, complainants; Iowa-Wisconsin Bridge Company (herein sometimes referred to as "Bridge Company"), a Deloware corporation, defendant* (F. R.[1] 1).

Upon intervention petition of Kendrick and others (F. R. 73-83), Phoenix Finance Corporation (hereinafter sometimes referred to as "Phoenix"), *also a Delaware corporation*, though not named in petition, made involuntary party complainant (F. R. 85, 86). Phoenix as the holder of more than 25% of the bonds secured by the Deed of Trust, the basis of the Foreclosure Cause, had requested Trustees to foreclose and had agreed to indemnify Trustees for expenses incurred (F. R. 789-791; 794-795).

Phoenix appeared and answered intervention petition (F. R. 91-92) by pleading ignorance of certain alleged acts of fraud on the part of *Phoenix Finance System, Inc.*,[2] charged as occurring for the most part in 1930 and early 1931. Phoenix not incorporated until December 29, 1931 (F. R. 542). No allegations or subsequent evidence as to identity of interest as between Phoenix and *Phoenix Finance Sys-*

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[1] Whenever in this petition and brief, a record reference is designated as "F. R.," the certified and printed record in connection with former petition in this Court for certiorari on behalf of Phoenix Finance Corporation (No. 438, October Term, 1938) in the Foreclosure Cause is intended. Whenever the record reference is designated as "R," the certified and printed record in this cause in the Supplemental and Ancillary Proceeding is intended.

[2] Not to be confused with petitioner.

tem, Inc. appears in Foreclosure Record except testimony (F. R. 541) defining status as assignee and assignor, respectively, of certain claims. *No evidence of fraud on part of Phoenix Finance System, Inc. chargeable in any way to Phoenix.*

Issues in Foreclosure Cause referred to a Master (F. R. 107-108). Phoenix did not participate in trial before Master and offered no evidence. The trustee complainants had "exclusive control" of the litigation (F. R. 211). Tacit understanding of all parties and Master as to procedure at trial was that there were two distinct stages in the proceeding, viz., (1) *the issue of the validity of the Deed of Trust,* and, if Deed of Trust was found valid to any extent and foreclosure ordered, (2) *the issue as to what bonds were validly entitled to participation in proceeds of sale* (F. R. 225, 226, 228-230, 259, 282, 363, 451, 561, 637, 693, and Exhibit S. C. 106, R. 584). This procedural understanding (or misunderstanding) is also evidenced by "Suggestions of Respondents, First Trust and Savings Bank and A. H. Schubert as Trustees" filed in this Honorable Court in connection with petition for writ of certiorari in said Foreclosure Cause (No. 438 October Term 1938) in part as follows:

> "The Trustees presented the case in the District Court on the theory, believed to have been accepted by the Master in Chancery, that only one issue was then up for consideration, namely, the right to a foreclosure of the Mortgage Deed of Trust, and assumed that the question of the validity of the bonds would not be taken up until after a foreclosure was ordered (R. 224-230).[3] That is to say, the trustees never pretended to represent bondholders for any other purpose except that relating to the security under the mortgage.

---

[3] The reference is to record herein designated as the Foreclosure Record, or "F. R.."

"At no time, did Counsel for the trustees attempt to prove the validity or disprove the invalidity of any individual bond, as such. With the controversy between the mortgagor and the bondholders relating to the validity of individual bonds, the trustees felt they had nothing to do. Petitioner Phoenix Finance Corporation, the only bondholder in Court, was represented by its own Counsel (R. 91-92, 228-230).[4]

"Counsel feel that if bondholders are to assume that they were represented in the courts below by us, they have reason to be dissatisfied with their representation."

Case never went beyond first procedural stage, and Master held Deed of Trust and bonds secured thereby partially valid and partially invalid, and recommended foreclosure (F. R. 138) to the extent held valid. District Court partially affirming and partially reversing Master decreed (F. R. 202-204):

"And the Court now being fully advised in the premises, it is Ordered, Adjudged, and Decreed that the findings and conclusions of the Master, except as modified and amplified by additional findings, be adjudged as the findings and conclusions of the Court, with such additional findings and conclusions as are filed in the cause. That the mortgage and bonds in suit were fraudulently issued. That all bonds are without valid consideration, with the exception of the bonds aggregating $15,000, hereinafter specified. That the bill of the plaintiffs be dismissed as to the plaintiff, Phoenix Finance Corporation, and that the prayer of the bill be denied, except in so far as the Decree provides for the protection of the holders of said $15,000[5] in bonds. *That foreclosure and sale of the mortgaged property be denied* * * *." (Emphasis supplied.)

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[4] The reference is to record herein designated as the Foreclosure Record, or "F. R."

[5] This $15,000 not related directly or indirectly to any issues raised by Supplemental and Ancillary Proceedings.

Phoenix petitioned for rehearing (F. R. 216-224) with supporting affidavits (F. R. 224-391). Denied (F. R. 411).[6] On appeal to Circuit Court of Appeals for the Eighth Circuit, decree below in Foreclosure Cause affirmed (Opinion, F. R. 1689, 98 F. (2d) 416; Decree, F. R. 1709). Petition for writ of certiorari to Supreme Court of the United States denied (305 U. S. 650, 676; No. 438 October Term 1938).

(b) The Proceedings Prior to the Filing of the Supplemental and Ancillary Bill.

After final disposition of the Foreclosure Cause, Phoenix docketed four suits against the Bridge Company at law in the Superior Court of the State of Delaware and one suit in equity in the Court of Chancery of said State, as follows:

1. Action of assumsit on Bridge Company notes, $3,125 and $2,000[7] (Exhibits S. C. 101, R. 386); Bridge Company appeared generally; filed plea of *res adjudicata;* case tried by stipulation before court without jury on sole issue of *res adjudicata* based upon decree of December 1, 1936 in the Foreclosure Cause; judgment[8] for plaintiff rejecting defense of *res adjudicata* on opinion of two of six judges of Supreme Court of State of Delaware sitting in *nisi prius* (see *Phoenix Finance Corporation* v. *Iowa-Wisconsin Bridge Company,* 14 Atlantic (2d) 386); *this case now pending on writ of error to Supreme Court of Delaware; argument set for January Term 1941.*[9]

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[6] Charged by Answer and Counterclaim of Phoenix in Supplemental and Ancillary Cause, hereinafter mentioned, that denial of rehearing was the result of fraudulent tactics of interveners and counsel (R. 166-167).

[7] These notes were part of $17,735.19 of notes for which $20,100 of Bridge Company bonds (secured by the Deed of Trust involved in the Foreclosure Cause) were delivered to Phoenix *as security only* (F. R. 829).

[8] The decree below orders Phoenix and its attorneys to satisfy this judgment at its own costs.

[9] See Certificate of Clerk of Supreme Court, *addendum* hereto.

2. Action of assumpsit [10] on Bridge Company notes, $500 and $12,110.19 [11] (Exhibit S. C. 103, R. 482); Bridge Company appeared generally; pleaded *res adjudicata* based upon decree in Foreclosure Cause; case pending trial but further action enjoined by decree of District Court this cause.

3. Action of covenant [10] for breach of sealed agreement of November 10, 1940; damages claimed $21,262.71, actual loss of assignor of Phoenix (Exhibit S. C. 104, R. 522). General appearance and plea of *res adjudicata* based upon Foreclosure Cause. Further action enjoined as in 2.

4. Action of debt [10] on two $500 Series "B" bonds of Iowa-Wisconsin Bridge Company (parcel of the bonds secured by the Deed of Trust in the Foreclosure Cause —Exhibit S. C. 105, R. 546). These bonds purchased by Phoenix for value after institution of Foreclosure Cause from one not a party to and not appearing in Foreclosure Cause. General appearance and plea of *res adjudicata* based upon decree in Foreclosure Cause. Further action enjoined as in 2.

5. Bill of Complaint [10] in Court of Chancery to compel Bridge Company to issue to Phoenix Finance Corporation 517 shares of Bridge Company preferred stock which Bridge Company received from Phoenix Finance Corporation in exchange for bonds (parcel of the bonds for which the Deed of Trust in the Foreclosure Cause was security). The transaction is attacked in the Court of Chancery of Delaware solely on the ground that at the time the Bridge Company acquired its own shares of stock in the aforesaid transaction, its capital was impaired, in violation of 2051 Section 19 of the Revised Code of the State of Delaware (1935)[12] and in violation of the appropriate provisions

[10] The decree below orders Phoenix and its attorneys to discontinue these actions at its own costs.

[11] These notes also were part of $17,735.19 of notes for which $20,100 of Bridge Company bonds (secured by the Deed of Trust involved in the Foreclosure Cause) were delivered to Phoenix *as security only* (F. R. 829).

[12 and 13] Quoted in supporting brief (footnotes pp. 27-28 *infra*).

of its corporate charter.[13] Bridge Company appeared generally and by answer set up defense of *res adjudicata* based upon decree in Foreclosure Cause. Further action enjoined as in 2.

In addition to commencing the foregoing actions, Phoenix also filed for record in Allamakee County, Iowa, and in Crawford County, Wisconsin, a certain $50,000[14] mortgage dated March 10, 1931, given by the Bridge Company to Phoenix Finance System, Inc. and assigned to Phoenix.[15]

(c) The Supplemental and Ancillary Cause.

After all of the foregoing steps had been taken by Phoenix and after the Bridge Company had submitted itself to the jurisdiction of the Delaware courts and had tried the first Delaware lawsuit and pending decision therein, it filed in the United States District Court for the Northern District of Iowa a *Supplemental and Ancillary Bill of Complaint* wherein Iowa-Wisconsin Bridge Company, a corporation of the State of Delaware, is sole complainant, and Phoenix Finance Corporation, a corporation of the State of Delaware, is sole defendant (R. 3). Phoenix appeared and after its original answer and cross-bill was stricken on motion (R. 749), it filed an answer and counterclaim (R. 146), a portion of which was likewise stricken by order of court (R. 171).

The primary defense was one of law, viz., that the decree of December 1, 1936 in the Foreclosure Cause did not and legally could not constitute a valid adjudication against Phoenix on its underlying indebtedness against the Bridge

[14] This mortgage is not to be confused with the $200,000 Deed of Trust which was the subject of the Foreclosure Cause. This is an "open" mortgage providing for further anticipated financing beyond $50,000, and by reason of further advances of $9,000 to pay liens against the bridge is now security for a total debt of $59,000.

[15] The decree below commands Phoenix to satisfy this mortgage of record and to deliver note to Clerk of District Court for cancellation.

Company (1) because Phoenix was not an indispensable party against whom such an adjudication could be made, and (2) because a determination as to the validity of Bridge Company notes held by Phoenix and other claims against the Bridge Company was not within the issues of the Foreclosure Cause.

Entirely apart from said primary legal defense, the parts of the answer so stricken raise the defense of fraud in the procurement of the decree in the Foreclosure Cause (and particularly in the denial of the petition for rehearing (R. 166-167) the defense that the defendant had not done equity (and particularly the application thereof known as "Lord Redesdale's Rule") and the defense that the complainant was in court with unclean hands. In addition, Phoenix, by the stricken portion of its answer, asserted a counterclaim against the Bridge Company for $98,349.46 exclusive of interest (Exhibit S. C. 114, R. 595 *et seq.*).

Phoenix sought to take depositions of witnesses to prove facts in support of its answer and counterclaim. It was denied such right by order of the District Court (R. 223, 256). At the trial, further evidence offered by Phoenix was rejected (R. 275-292). Eliminating the rejected evidence, there were substantially no controverted facts, and decree for complainant followed, dated March 23, 1940 (R. 719).

By the decree, Phoenix was:

(1) Permanently enjoined and restrained from conducting or carrying forward in any manner whatsoever any and all of the Delaware actions above mentioned;

(2) Required forthwith to dismiss all of said actions at its own cost and to satisfy the judgment which had theretofore been obtained in the action first above mentioned (14 Atl. (2d) 386);

(3) Ordered to release, satisfy, and remove from record both in Allamakee County, Iowa, and in

Crawford County, Wisconsin, the said mortgage of March 10, 1931;

(4) Ordered to deliver the original of said mortgage and the note secured thereby to the Clerk of the District Court for cancellation;

(5) Permanently enjoined and restrained from commencing, prosecuting or bringing in question, or in any manner carrying forward, any suits or causes of action purportedly *involved* in the findings of fact, conclusions and decree of December 1, 1936 in the Foreclosure Cause and the order denying rehearing and modification thereof of March 4, 1937.

On appeal to the Circuit Court of Appeals for the Eighth Circuit, the foregoing decree was affirmed (Opinion, R. 767, Decree, R. 787). Mandate stayed pending determination this petition (R. 833).

II.

Statement of Supreme Court's Jurisdiction to Review the Decree in Question.

The jurisdiction of the Supreme Court of the United States to review the decree of the Circuit Court of Appeals for the Eighth Circuit affirming the decree of March 24, 1940 of the United States District Court for the Northern District of Iowa is found in sub-paragraph (2) of Section 240 of the Federal Judicial Code as amended (28 U. S. C. A., Sec. 347) as follows:

> "(a) In any case, civil or criminal, in a circuit court of appeals, * * * it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, * * * to require by certiorari * * * that the cause be certified to the Supreme Court for determination by it * * *."

III.

The Questions Presented.

The questions presented by this petition are as follows:

1. Whether or not the decree of December 1, 1936 in the Foreclosure Cause constitutes an adjudication against Phoenix Finance Corporation of the several issues and controversies involved in the Supplemental and Ancillary Proceedings, to wit, the issues and controversies involved in the Supplemental and Ancillary Proceedings, to wit, the five pending Delaware lawsuits, the $50,000 mortgage of record in Allamakee County, Iowa, and Crawford County, Wisconsin, and the $50,000 note for which the same is security.

2. Whether a Trustee under a deed of trust securing a bond issue "represents" the bondholders (at least in absence of express authority), so as to permit an adjudication, in a proceeding to foreclose the deed of trust, of contractual obligations and claims (including counterclaims and set-offs) between a bondholder and the defendant in the foreclosure proceeding.

3. Whether in such a proceeding the involuntary impleading of a bondholder, a Delaware corporation, as a party plaintiff, (the defendant mortgagor being also a Delaware corporation), gives to the impleaded bondholder the status of an indispensable party against whom a valid adjudication may be made, and if it does, whether this has any effect upon the jurisdiction of the Federal Court because of lack of necessary diversity of citizenship.

4. Whether the issues in the Delaware Chancery action (see Summary Statement (b), 5) are wholly unrelated to and unidentified with any matter before the court in the Foreclosure Cause and, said issues involving questions of

the internal affairs of a Delaware corporation, whether the Court of Chancery of the State of Delaware does not have exclusive jurisdiction thereof.

5. Whether the decree of March 23, 1940 in the Supplemental and Ancillary Cause denying to Phoenix the right to enforce its several claims and to litigate the same in courts having jurisdiction of the parties and the subject matter (*i. e.*, the Delaware courts) constitutes a deprivation of the property and property rights of Phoenix in violation of Article V of the Amendments to the Constitution of the United States.

6. Whether or not Section 1 of Article IV of the Constitution of the United States requires full faith and credit to be given to the decree of December 1, 1936 in the Foreclosure Cause in so far as Phoenix is concerned, with respect to issues not involved in the Foreclosure Cause, where Phoenix was only a "formal" party to that cause.

7. Whether or not the decree and supporting opinion of the Circuit Court of Appeals for the Eighth Circuit or the judgment and supporting opinion (14 Atl. (2d) 386) of the Superior Court of Delaware (when and if affirmed by the Supreme Court of Delaware in the pending writ of error) is the applicable law of this case.

8. Whether or not the injunctions and mandatory orders against Phoenix in the decree of March 24, 1940 in the Supplemental and Ancillary Cause, whereby Phoenix is restrained, *inter alia*, from further prosecuting the pending Delaware actions, is ordered to dismiss the same at its cost, and is directed to satisfy the one judgment already obtained (14 Atl. (2d) 386) at its cost, violates Section 265 of the Federal Judicial Code and (the defense of *res adjudicata* being legally available and adequate) recognized principles of equity jurisprudence.

9. Whether or not by reason of the equitable maxim: "He who seeks equity must do equity," and the particular application thereof known as "Lord Redesdale's Rule," the Bridge Company by its bill of complaint *supplemental* and *ancillary* to the foreclosure decree was required to show that such decree was a "right" one and whether or not the petitioner as the defendant in said Supplemental and Ancillary Bill by its Answer and Counterclaim and by evidence in support thereof was entitled to show that the decree in said Foreclosure Cause should not be implemented.

10. Whether or not the decree of December 1, 1936 in said Foreclosure Cause is supplemented, enlarged and "pieced out" by the decree of March 24, 1940 in the Supplemental and Ancillary Cause.

11. Whether or not the District Court on the Supplemental and Ancillary Bill should have taken cognizance of the tendered proof of fraud inherent in its decree of December 1, 1936 in the Foreclosure Cause when such issue and proof were tendered by way of *defense* to a Supplemental and Ancillary Bill designed to implement and enlarge said foreclosure decree.

IV.

The Reasons Relied On for the Allowance of Writ of Certiorari.

In the exercise by the Supreme Court of its judicial discretion to grant the writ herein prayed, it is submitted by petitioner that there are special and important reasons therefor, to wit:

(a) That the Circuit Court of Appeals has decided important Federal questions, viz., the application of Section 1 of Article IV (the due process clause) of, and Article V of the Amendments (the full faith and credit clause) to,

the Constitution of the United States, in a way in conflict with the applicable decisions of this Court in that the Circuit Court of Appeals, affirming the District Court, held that the decree of December 1, 1936 in the Foreclosure Cause, as supplemented by the decree of affirmance thereof by the Circuit Court of Appeals and the mandate thereof, constitutes an adjudication against Phoenix of the several issues and controversies involved in the Supplemental and Ancillary Cause.

(b) That the Circuit Court of Appeals has affirmed a ruling by the District Court which, in effect, holds that the rights of Phoenix were adjudicated in a cause to which it was not an indispensable party, or represented (to the extent claimed) by an indispensable party, and in which cause the issues claimed to be adjudicated were not and could not have been involved if the District Court was to retain jurisdiction of the Foreclosure Cause.

(c) That in the respects mentioned in paragraphs (a) and (b), the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such departure by the District Court as to call for the exercise of this Court's power of supervision.

(d) That said decree is in conflict with applicable decisions of this Court in that the denial to Phoenix of the right to enforce its claims and to litigate the same in courts having jurisdiction of the parties and of the subject matter, constitutes a deprivation of the property rights of Phoenix Finance Corporation without due process of law, in violation of Article V of the Amendments to the Constitution of the United States, in violation of Section 265 of the Federal Judicial Code and in violation of recognized principles of Equity Jurisprudence.

(e) That the Circuit Court of Appeals in affirming the District Court has extended the "doctrine of representation" (*i.e.*, that Phoenix as a bondholder was represented by the Trustees in the Foreclosure Cause to the extent that an adjudication of its notes, claims, and contractual obligations against the mortgagor existing independently of the deed of trust and the bonds secured thereby, could validly be made) to a point not justified by the applicable decisions of this Court, in conflict with its own prior decisions, and in derogation of the constitutional rights of the petitioner.

(f) That in thus deciding, the Circuit Court of Appeals has established a precedent affecting the rights of bondholders everywhere, and which subjects them (whether or not they are in court as "formal" parties) to an adjudication of their property rights quite apart from the mortgage under foreclosure and without judiciable issues framed in pursuance of the usual and accepted course of judicial proceedings and the requirements of due process. The decision has far-reaching effects upon trustees everywhere and casts upon them new and unheard of duties and responsibilities in defending all underlying contract rights of their respective and numerous bondholders, incompatible with their purely fiduciary obligations.

(g) That in the event of an affirmance by the Supreme Court of Delaware of the judgment of the Superior Court in the pending writ of error involving the one case tried and determined between the parties in Delaware (see Foreword and Summary Statement (b), 1, p. 7, *supra*), there will be an unreconcilable conflict between the Circuit Court of Appeals for the Eighth Circuit and the Supreme Court of Delaware. Such conflict now exists as between the decree and supporting opinion of the Circuit Court of Appeals and the judgment and supporting opinion of the Superior

Court of Delaware. Accordingly, Phoenix is permitted to proceed with all the Delaware actions by the applicable decisional law of Delaware but is restrained from so proceeding by the Federal Court of the Eighth Judicial Circuit. This creates an intolerable situation so far as concerns the petitioner and its counsel. *It is pointed out that the decree below is of such purported effect as even to restrain Phoenix from defending the writ of error in the Supreme Court of Delaware and from appearing therein as defendant in error.*

(h) That the effect of the decree of the Circuit Court of Appeals affirming the District Court is to sanction a judgment on purely legal claims in a controversy between citizens of the same State in a Federal court, thereby exceeding the jurisdiction of the Federal court and so purporting to extend that jurisdiction as to call for the exercise by this Court of its power of review and supervision.

(i) That the Circuit Court of Appeals has decided an important question of Federal law, viz., whether the joinder by order of the District Court in the Foreclosure Cause of an involuntary party plaintiff, a citizen of the same State as the defendant, and a resulting adjudication of purely legal claims, unrelated to the issue of foreclosure, will oust Federal jurisdiction if previously existing. The decision is in conflict with decisions of the Circuit Court of Appeals of other circuits and presents a question which has not heretofore been, but should be, decided by this Court.

(j) The Circuit Court of Appeals has decided an important matter of local law, *i.e.*, the law of Iowa with respect to necessary parties in a suit attacking the mortgage for alleged invalidity of the indebtedness, in conflict with applicable decisions of the State of Iowa.

(k) The Circuit Court of Appeals has decided an important matter of local law, which is exclusively within the juris-

diction of the Court of Chancery of the State of Delaware, *i. e.*, a matter relating to the internal affairs of a Delaware corporation, and particularly the right of Phoenix, otherwise a stockholder of the Bridge Company, to have re-issued to it 517 shares of Bridge Company preferred stock acquired by the Bridge Company from Phoenix in violation of Delaware Law and its own charter provisions. In this respect, the decision of the Circuit Court of Appeals is in conflict with the statutory and decisional law of the State of Delaware.

(l) That the Circuit Court of Appeals has misinterpreted and misapplied the applicable decisions of this Court and of other circuits with respect to the equitable maxim: "He who seeks equity must do equity," and the particular application thereof known as "Lord Redesdale's Rule," in holding that the decree of December 1, 1936 in the Foreclosure Cause "is conclusively presumed to be correct" in a Supplemental and Ancillary Proceeding of this character; that the complainant in the Supplemental and Ancillary Proceeding is not required to show that the former decree is a "right" one; that the defendant in the Supplemental and Ancillary Proceeding may not show that the decree was induced by fraud, assumes facts not established by the record, and is otherwise "wrong"; and that the said Circuit Court of Appeals also failed to recognize (again misinterpreting and misapplying the applicable decisions of this Court and of other courts) that the decree affirmed by the Circuit Court of Appeals does in fact supplement, enlarge, and materially and substantially "piece out" the said decree of December 1, 1936.

(m) That the Circuit Court of Appeals has decided an important question of law at variance with the applicable decisions of this Court and of other circuits and the express limitations and exceptions of such decisions, viz., that the

Circuit Court of Appeals failed to recognize the distinction between a party *affirmatively* seeking to have a former decree set aside on the ground of fraud and a party *defending* against a suit to implement or enforce a fraudulent decree, and in failing to recognize such established distinction, held that Phoenix as a *defending* party was bound by the same rule as though it were *affirmatively* attacking said former decree.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals of the United States for the Eighth Judicial Circuit, commanding that court to certify and to send to this Court for its review and determination on a day certain to be named therein, a true and complete copy of the record and proceedings in the cause in said court, the same being numbered on its docket No. 11,734 and being entitled "Phoenix Finance Corporation, a corporation of the State of Delaware, Appellant, v. Iowa-Wisconsin Bridge Company, a corporation of the State of Delaware, Appellee", and that, upon consideration thereof, the decree of said Circuit Court of Appeals be reversed.

And your petitioner further respectfully prays that this Honorable Court withhold its ruling upon the within petition for writ of certiorari until the determination by the Supreme Court of the State of Delaware in that certain cause numbered on the docket of said Court No. 4 October Term 1940 and entitled "Iowa-Wisconsin Bridge Company, a corporation of the State of Delaware, Defendant below-plaintiff in error, vs. Phoenix Finance Corporation, a corporation of the State of Delaware, Plaintiff below-defendant in error;" that upon the determination of said cause in said Supreme Court of Delaware, your petitioner may be permitted to file with the Clerk of the Supreme Court not

less than ten certified copies of the opinion, decree and mandate of said Supreme Court of Delaware; and that your petitioner may have such other and further relief in the premises as to this Honorable Court may appear meet and just.

And your petitioner, as in duty bound, will ever pray, etc.

PHOENIX FINANCE CORPORATION,
By JAMES R. MORFORD,
One of its Attorneys.

MARVEL & MORFORD,
ZIMMERMAN & NORMAN,
CASPER SCHENK,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 624

PHOENIX FINANCE CORPORATION, A CORPORATION OF THE STATE OF DELAWARE,

Petitioner,

vs.

IOWA-WISCONSIN BRIDGE COMPANY, A CORPORATION OF THE STATE OF DELAWARE.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The opinion of the District Court of the United States for the Northern District of Iowa (not yet reported) on the Supplemental and Ancillary Bill appears at pages 717-719 of the Record. The opinion of the Circuit Court of Appeals for the Eighth Circuit (not yet reported) appears at pages 767-787 of the record.

The opinion of the Superior Court of Delaware in the case referred to in the petition (Foreword and Summary (b), 1, p. 7, *supra*) appears in 14 Atlantic (2d) 386.

Writ of error to Supreme Court of Delaware (No. 4, October Term, 1940) is pending, and argument will be regularly calendared for January Term, 1941. [16]

In the Foreclosure Cause, the opinion of the District Court appears in 19 Fed. Supp. 127 (F. R. 156, 208, 411), and of the Circuit Court of Appeals in 98 Fed. (2d) 416 (F. R. 1689-1709).

Jurisdiction.

Writ of certiorari is prayed pursuant to the authority of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938; 28 U. S. C. A., Sec. 347 (a)).

The reasons relied on for the exercise by this Court of its judicial discretion under the above cited Section have been stated in sub-heading IV of the petition (pp. 14-19 *supra*).

Basically, there is involved in this petition the requested construction by the Supreme Court of the decree of December 1, 1936 in the Foreclosure Cause in the District Court (F. R. 156) as affirmed by the decree (F. R. 1709) and mandate (R. 697) of the Circuit Court of Appeals in that cause. The two major questions as to the effect of the foreclosure decree relate to: (1) the effect of that decree as an *adjudication* against Phoenix, an involuntarily impleaded party complainant, of Phoenix' legal claims on notes, contracts and open accounts, and Bridge Company's unpleaded counterclaims or set-offs with respect thereto, and (2) the right of Phoenix as the defendant in the Supplemental and Ancillary Cause, to challenge the Foreclosure decree under "Lord Redesdale's Rule."

Essentially, therefore, it is the petitioner's contention that the District Court in the Foreclosure Cause was with-

[16] See certificate of Clerk of Supreme Court of Delaware, *addendum* hereto.

out *jurisdiction* to adjudicate against it in a cause (1) where it was but a "formal" party (F. R. 211), and (2) where such purported adjudication was not responsive to issues tendered by the pleadings. The *construction* of the prior decree involving a determination of the scope of the jurisdiction of the court rendering the prior decree is a proper matter to be considered by the Supreme Court on writ of certiorari.

St. Louis, etc., Railroad Company v. *Wabash Railroad Company, etc.*, 217 U. S. 247, 30 S. Ct. 510, 54 L. Ed. 752;

Baltimore & Ohio R. R. v. *Parkersburg*, 268 U. S. 35;

KVOS, Inc. v. *Associated Press*, 299 U. S. 269.

The existing conflict between the Circuit Court of Appeals and the Superior Court of Delaware (and in the event of an affirmance on pending writ of error, the Supreme Court of Delaware) relating to the construction and legal effect of the decree of December 1, 1936, in the Foreclosure Cause, is another important consideration calling for the exercise of the discretionary jurisdiction of the Supreme Court.

Forsyth v. *Hammond*, 166 U. S. 506, 17 S. Ct. 665, 41 L. Ed. 1095.

Specifications of Error.

1. That the Circuit Court of Appeals for the Eighth Circuit erred in holding that the decree of December 1, 1936 in the Foreclosure Cause constituted an adjudication against Phoenix Finance Corporation of the several issues and controversies in the Supplemental and Ancillary Cause.

2. That said court erred in holding that the Trustee under a deed of trust securing a bond issue, in a proceeding to foreclose the deed of trust, "represents" the bondholder so as to permit an adjudication of contractual obligations and claims (including unpleaded counterclaims and set-

offs) between a bondholder and the defendant in the Foreclosure proceeding.

3. That said court erred in holding that in the Foreclosure Cause, the involuntary impleading of a bondholder, Phoenix Finance Corporation, a Delaware corporation, as party plaintiff (the defendant mortgagor being also a Delaware corporation) gave to such impleaded bondholder the status of an indispensable party against whom a valid adjudication on unpleaded issues may be made, and that said court further erred in failing to recognize that the result of its holding in this respect is such as to divest the Federal court of jurisdiction because of the absence of diversity of citizenship.

4. That said court erred in failing to consider the exclusive jurisdiction of the Court of Chancery of Delaware with respect to the Delaware Chancery action (see Summary Statement (b), 5) and the issues thereof as being unrelated to and unidentified with any matters before the court in the Foreclosure Cause.

5. That said court erred in so construing said decree of December 1, 1936 in the Foreclosure Cause as to deny to Phoenix the right to enforce its several claims in the Delaware courts, where jurisdiction of the parties and subject matter existed, and in so doing, denied to Phoenix due process, in violation of Article V of the amendments to the Constitution of the United States.

6. That said court erred in that the injunctions and mandatory orders against Phoenix involved in the decrees below, whereby Phoenix is restrained from further proceeding with the pending Delaware actions and is ordered to dismiss the same at its cost and to satisfy at its cost the judgment already obtained (in connection with which a writ of error to the Supreme Court of Delaware is pending), vio-

lated Section 265 of the Federal Judicial Code and general principles of Equity Jurisprudence (the defense of *res adjudicata* being available and asserted in the Delaware actions and being legally adequate).

7. That said court erred in holding that on the Supplemental and Ancillary Bill, the Bridge Company, complainant, was not required to show that the decree in the Foreclosure Cause was a "right" one and in holding that the defendant (the petitioner herein) was not entitled to show, in a proceeding *supplemental* as well as ancillary to the Foreclosure Cause, that such decree was the result of mutual mistake (on the procedural point) and fraud, and that the complainant in the Supplemental and Ancillary Bill had not "done equity" and was in court with "unclean hands."

8. That said court erred in failing to hold that the decree of December 1, 1936 in the Foreclosure Cause is supplemented, enlarged and "pieced out" by this decree in the Supplemental and Ancillary Cause, and that, therefore, under the decisions of this Court, the equitable principle known as "Lord Redesdale's Rule" is applicable.

9. That said court erred in failing to hold that the District Court should have taken cognizance in the Supplemental and Ancillary Cause of the tendered proof of fraud inherent in its decree in the Foreclosure Cause.

Statement of the Case.

The "Summary Statement of the Matter Involved" contained in the petition, *ante*, pp. 3-11, is a recital of such of the facts as are deemed necessary to apprise this Court of the nature of the case. Such statement is, of necessity, greatly condensed, and will, of course, be greatly amplified on final argument.

From the summary statement, the following factual points are emphasized:

(a) The Foreclosure Cause was typically one for the equitable foreclosure of a deed of trust securing a bond issue. The parties were the mortgagee (the Trustees) and the mortgagor (the Bridge Company).

(b) Phoenix Finance Corporation was a bondholder. There were no pleaded issues in the suit involving it. It was brought in involuntarily as a party plaintiff.

(c) Both the District Court and Circuit Court of Appeals in the Foreclosure Cause held Phoenix Finance Corporation to be but a "formal" party, and the Trustees the only "indispensable" party (F. R. 211; 19 Fed. Sup. at p. 142; F. R. 1692; 98 Fed. (2d) at p. 420).

(d) Phoenix Finance Corporation did not participate in the trial in the Foreclosure Cause and offered no evidence. This was not strictly a default or oversight but a procedural matter understood by all the parties and the Master, *i. e.*, that proof of validity of and consideration for all outstanding bonds was reserved for a "second stage" of the same proceeding.

(e) The first affirmative step by Phoenix Finance Corporation was to petition for a rehearing after the decree. This was refused because of a mistake of the District Court induced by the deliberate misrepresentation by counsel for the intervener, Kendrick, and other fraudulent tactics on the part of said counsel, his associate, and one of the interveners (R. 166, 167, 223, 256, 275-292).

(f) Phoenix Finance Corporation has brought the ultimate facts stated in (3) to the attention of the court in every proper way and on every available opportunity.

(g) In each of the Delaware cases, the Bridge Company has appeared generally and, along with other defenses, has

pleaded *res adjudicata* based upon the supposed effect of the decree in the Foreclosure Cause. The Bridge Company tried one of the Delaware cases before the filing of the Supplemental and Ancillary Bill upon the sole issue of *res adjudicata*, and the Delaware Superior Court (by written opinion of two Supreme Court Judges, 14 Atl. (2d) 386) overruled the plea and gave judgment.

(h) The Delaware Chancery case (see Summary Statement (b), 5, page 8, *supra*) involves the sole issue that the Bridge Company acquired its own stock in violation of the Delaware Corporation Law [17] and of its charter provisions.[18]

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[17] 2051 Section 19 of the Revised Code of Delaware. This Section provides:

"Every corporation organized under this Chapter shall have the power to purchase, hold, sell and transfer shares of its own capital stock; *provided that no such corporation shall use its funds or property for the purchase of its own shares of capital stock when such use would cause any impairment of the capital of the corporation;* and provided further that shares of its own capital stock belonging to the corporation shall not be voted upon directly or indirectly; and provided, further, that nothing in this Section shall be construed as limiting the exercise of the rights given by Section 27 of this Chapter." (Emphasis supplied.)

[18] The following clauses appear in the Bridge Company's charter (F. R. 1640, 1645):

"To purchase, hold, sell and transfer the shares of its own capital stock; *provided it shall not use its funds or property for the purchase of its own shares of capital stock when such use would cause any impairment of its capital;* and provided further that shares of its own capital stock belonging to it shall not be voted upon directly or indirectly.

The preferred stock may be redeemed in whole or in part on any dividend date at the option of the corporation to be exercised by its Board of Directors at One Hundred Ten Dollars ($110) a share and accrued dividends.

If less than all shares of preferred stock are to be redeemed, the shares to be redeemed shall be selected by lot or pro rata, as the Board of Directors may determine. Notice of the intention of the corporation to redeem shares of preferred stock shall be mailed at least thirty (30) days before the date of redemption to each holder of record of the shares to be redeemed, at his last known post office address as shown by the corporation's records. At any time after such notice has been

ARGUMENT.

Summary of Argument.

1. The decree of December 1, 1936, in the Foreclosure Cause as supplemented by the decree of affirmance of the Circuit Court of Appeals and the mandate thereof does not constitute an adjudication against Phoenix of the several issues and controversies involved in the Supplemental and Ancillary Proceedings because:

(a) Phoenix was only a "formal" party to that proceeding,

(b) Phoenix was not "represented" by the Trustees to an extent to put in issue (even if pleaded) the underlying obligations of the Bridge Company to Phoenix on contracts, notes and open accounts,

(c) There were no issues framed in the Foreclosure Cause involving Phoenix and no issues framed in the cause as to any party justifying an adjudication against Phoenix of the issues raised by the Supplemental and Ancillary Bill.

2. If the decree of December 1, 1936, in the Foreclosure Cause did constitute an adjudication of such issues against Phoenix, Phoenix must necessarily have had the status of "indispensable" party, and those issues involving legal

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mailed as aforesaid, the corporation may deposit the aggregate redemption price with any bank or trust company in the City of Lansing, Iowa, named in such notice, payable in the amounts aforesaid to the respective holders of the shares to be redeemed, on endorsement and surrender of their certificates, and thereupon such holders shall cease to be stockholders with respect to said shares, and from and after the making of such deposit said holders shall have no interest in or claim against the corporation with respect to such shares and shall be entitled only to receive said monies from said bank or trust company without interest. The corporation may also purchase shares for redemption at not exceeding the redemption price above specified.

Any preferred stock redeemed or purchased for redemption under any provision hereof, or otherwise, shall be cancelled and not reissued." (Emphasis supplied.)

claims with Phoenix, a Delaware corporation, as the plaintiff, and the Bridge Company, a Delaware corporation, as the defendant, the Federal Court had no jurisdiction thereof.

3. A construction of the decree of December 1, 1936, as denying to Phoenix the right to enforce its claims and to litigate the same in courts having jurisdiction of the parties and of the subject matter, constitutes a deprivation of the property and property rights of Phoenix, in violation of Article V of the Amendments to the Constitution of the United States.

4. The injunction against Phoenix from prosecuting the Delaware actions violates Section 265 of the Federal Judicial Code as well as principles of General Equity Jurisprudence.

5. The Delaware Court of Chancery has exclusive jurisdiction to hear and determine the issues involved in the proceeding in that Court (Summary Statement (b) 5).

6. By reason of the equitable maxim: "He who seeks equity must do equity," and the particular application thereof known as "Lord Redesdale's Rule," the Bridge Company by its bill of complaint supplemental and ancillary to the Foreclosure Decree was required to show that such decree was a "right" one, and Phoenix by its answer and counterclaim and by evidence in support thereof was entitled to show that such decree should not be implemented.

7. The scope of the decree in the Supplemental and Ancillary Proceeding is broader than the decree in the Foreclosure Cause and in effect substantially "pieces out" that decree. The case is a typical one for the application of "Lord Redesdale's Rule."

8. The District Court in the Supplemental and Ancillary Proceedings should, when raised by way of defense, have

taken cognizance of the tendered proof of fraud inherent in its own decree.

Point I.

The decree of December 1, 1936, *in the Foreclosure Cause as supplemented by the decree of affirmance of the Circuit Court of Appeals and the mandate thereof does not constitute an adjudication against Phoenix of the several issues and controversies involved in the Supplemental and Ancillary Proceedings because* • • •

(a) Phoenix was only a "formal" party to that proceeding.

The District Court in the Foreclosure Cause held that "the trustees were the only indispensable parties plaintiff, had *exclusive control of the litigation,*" and that Phoenix "was merely a formal and not an indispensable" party (F. R. 211; 19 Fed. Sup. at p. 142). In the Circuit Court of Appeals, it was held (F. R. 1692; 98 Fed. (2d) at p. 420) that "it is apparent that the Trustees are the only necessary and indispensable parties plaintiff.

The Supreme Court of the United States has divided parties into three classes, viz., (1) formal, (2) necessary but not indispensable, and (3) indispensable.

Shields v. *Barrow*, 17 How. 130, 15 L. Ed. 158;

Williams v. *Bankhead*, 19 Wall. 563, 22 L. Ed. 184;

Waterman v. *The Canal-Louisiana Bank etc. Co., Executor*, 215 U. S. 33, 30 S. Ct. 10, 54 L. Ed. 80;

Minnesota v. *Northern Securities Co.*, 184 U. S. 199, 22 S. Ct. 308, 46 L. Ed. 499.

The criterion by which to determine when one is a mere "formal" or "nominal" party is whether or not a decree is sought against it.

Payne v. *Hook*, 7 Wall. 425, 19 L. Ed. 260;

Union Bank of Louisiana v. *Stafford*, 12 How. 327, 13 L. Ed. 1008;

Wormley v. *Wormley*, 8 Wheat. 421, 5 L. Ed. 651;
Niles-Bement-Pond Co. v. *Iron Moulders Union &c.*, 254 U. S. 77, 41 Sup. Ct. 39, 65 L. Ed. 145;
Horn v. *Lockhart*, 17 Wall. 570, 21 L. Ed. 657.

No decree was sought or rendered against Phoenix in the Foreclosure Cause.

(b) Phoenix was not "represented" by the Trustees to an extent to put in issue (even if pleaded) the underlying obligations of the Bridge Company to Phoenix on contracts, notes and open accounts.

The Delaware Superior Court in the one case fully tried between the parties and involving, as the sole issue, the defense of *res adjudicata* arising from the decree in the Foreclosure Cause said (*Phoenix Finance Corporation* v. *Iowa-Wisconsin Bridge Company*, 14 A. (2d) 386, 389):

"We think that in a suit to foreclose a mortgage securing a bond issue the doctrine of representation of the bondholders by the Trustee means that the Trustee represents all bondholders in all things relating to their common or individual interest in the trust of property, or in the bonds, but that such representation does not extend beyond a consideration of the trust property, or of the bonds secured thereby. The Trustee cannot, by implication, be held to represent the bondholders beyond the terms of the instrument under which, alone, the Trustees have their origin of existence. The subject matter upon which the representation would apply must be one as to which both the Trustee and the person represented have an interest. In this case we are not directly concerned with the question as to whether the representation of a bondholder by a Trustee includes an inquiry as to the validity of the bonds themselves, or at what stage of the proceedings such inquiry should be had. No such question is here presented, for we are in no way interested in the bonds, as such.

The foregoing conclusion is not, we think, in any way inconsistent with Kerrison v. Stewart, 3 Otto. 155, 23 L. Ed. 843; Mercantile Trust Co. v. Schlafly, 8 Cir. 299 F. 202; Richter v. Jerome, 123 U. S. 233, 8 S. Ct. 106, 31 L. Ed. 132; Beals v. Illinois, etc., R. R. Co., 133 U. S. 290, 10 S. Ct. 311, 33 L. Ed. 608; or Elwell v. Fosdick, 134 U. S. 500, 10 S. Ct. 598, 33 L. Ed. 998." (Emphasis supplied.)

The foregoing succinctly states petitioner's contention. The decrees below are to a contrary effect.

The doctrine of representation is confined to the subject of the trust. The Trustees represent the bondholder and in things "*relating to their common interest in the trust property.*"

Kerrison v. *Stewart, supra;*
Central Tr. Co. v. *California & N. R. Co.*, 110 Fed. 70.

The Trustee is a special, not a general, agent of the bondholders and is limited to the legitimate purposes of the relation he sustains to the security and the parties entitled to the benefit thereof.

Mackay v. *Randolph Macon Coal Co. et al.*, 178 Fed. 881 (C. C. A. 8th);

Moran v. *Hagerman*, 64 Fed. 499 (C. C. A. 9th);

Harrisburg & Eastern R. Co.'s Appeal, 1 Mona. (Pa.) 692, 15 A. 459, 1 L. R. A. 230 (citing Supreme Court cases);

Iowa Title & Loan Co. v. *Clark Bros. et al.*, 213 Iowa 875, 237 N. W. 336;

Fonda J. & G. R. Co. v. *New York Trust Company*, 233 App. Div. 443, 254 N. Y. S. 266;

Short on Railroad Bonds and Mortgages, Secs. 274, 497.

The Iowa cases are particularly applicable because the Foreclosure Cause concerned the foreclosure in the Federal

Court in Iowa of a deed of trust on Iowa property. It is well established that rules of substantive law of the state are controlling on the Federal courts.

Erie R. R. v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188;
Ruhlin v. *N. Y. Life Ins. Co.*, 304 U. S. 202, 82 L. Ed. 1290.

In Iowa, it is held that the holder of the indebtedness secured by a mortgage is a "necessary" party to a suit attacking the mortgage for invalidity of the indebtedness.

Clemons v. *Elder*, 9 Iowa 272.

See also:

Iowa Title & Loan Co. v. *Clark Bros. et al.*, 213 Iowa 875, 237 N. W. 336.

This is incompatible with the bondholder's appearance in the case by "representation" only.

The principle for which petitioner contends is also well stated in the Eighth Circuit case of *Toucey* v. *New York Life Ins. Co.*, 102 Fed. (2d) 16, 19, as follows:

> "The illustration of the rule is where it is made to appear in an equity suit brought to foreclose a mortgage or other lien that there is in fact no valid lien to enforce in equity. *In such cases the equity court may not proceed to adjudicate a claim of legal liability upon a promissory note or upon a purely legal obligation unrelated to equitable liens.* In such cases, the legal controversy presented is independent and distinct." (Emphasis supplied.)

(c) There were no issues in the Foreclosure Cause involving Phoenix and no issues framed in the cause as to any party justifying an adjudication against Phoenix of the issues raised by the Supplemental and Ancillary Bill.

An adjudication to be valid (apart from the question of parties) must be within the issues as defined by the pleadings.

Reynolds et al. v. *Stockton, Receiver,* 140 U. S. 254, 35 L. Ed. 464;

Southern Pacific R. Co. v. *U. S.,* 168 U. S. 1, 42 L. Ed. 355, 377;

Baltimore Steamship Co. v. *Phillips,* 274 U. S. 316, 319, 71 L. Ed. 1069, 1071;

Duchess of Kingston's Case, 1 Leach 146, 168 Eng. Repr. 175; 2 Smith's Lead. Cas. (12th ed.) 754.

In the Eighth Circuit, it was stated in the case of *Union Central Life Ins. Co., etc.* v. *Drake,* 214 Fed. 536, 545:

> "But there was no pleading of or prayer for a subrogation of the insurance company to the rights of the first mortgagee to his liens upon the three forties, *and evidence without pleading is as futile to sustain an adjudication of an issue as pleading without proof.*" (Emphasis supplied.)

See also:

Cromwell v. *County of Sac,* 94 U. S. 351, 24 L. Ed. 195;

Landon v. *Clark,* 221 Fed. 841;

Yost v. *Yost,* (Ct. of App. Md. 1937) 190 A. 753;

Lewis' & Nelson's Appeal, 67 Pa. 153;

Smith v. *Rountree,* 185 Ill. 219, 56 N. E. 1130;

Kicinko et al. v. *Petruska et al.,* 259 Pa. 1, 102 Atl. 286, 288;

1 Freeman on Judgments, 5th ed., Sec. 37, p. 674.

Point II.

If the decree of December 1, 1936 in the Foreclosure Cause did constitute an adjudication of such issues against Phoenix, Phoenix must necessarily have had the status of "indispensable" party, and those issues involving legal

claims with Phoenix, a Delaware Corporation, as the plaintiff and the Bridge Company, a Delaware corporation, as the defendant, the Federal Court had no jurisdiction thereof.

Under this heading, it is assumed *arguendo,* as the Court below held, that there *was* a valid adjudication against Phoenix, a Delaware corporation, with respect to legal and equitable issues. With such issues we must regard Phoenix as the party plaintiff (or defendant to any counterclaim or set-off) and the Bridge Company, another Delaware corporation, as the party defendant (or plaintiff to any counterclaim or set-off). It is true that these things were not involved in the issue of mortgage foreclosure, but the Court has said that these issues were decided. How does this affect Federal jurisdiction?

Phoenix must of necessity have been an "indispensable" party for there to have been an adjudication against it on any issue involved in the Supplemental and Ancillary Bill.

This Court said in *Robinson v. Anderson,* 121 U. S. 522, 524:

> "Even if the complaint, standing by itself, made out a case of jurisdiction * * * it was taken away as soon as the answers were in, because if there was jurisdiction at all it was by reason of the averments in the complaint * * *; and these were of no avail as soon as the answers were filed * * *."

To the same effect are:

Lambert Run Coal Co. v. *Baltimore & Ohio R. Co.,* 258 U. S. 377, 383;

Boston, etc., Mining Co. v. *Montana Ore Purchasing Co.,* 188 U. S. 632, 643;

Helm v. *Zarecor,* 222 U. S. 32, 36;

Florida Central, etc., R. Co. v. *Bell,* 176 U. S. 321, 330.

The Constitution limits Federal jurisdiction to "controversies * * * between citizens of different states."

Article III, Section 2, Amendment X. If we may assume that the Court in the Foreclosure Cause only decided issues properly raised, there existed a "controversy (vital to the entire case, but between citizens of Delaware) which had taken shape for judicial decision."

Florida v. *Georgia*, 58 U S. (17 How.) 478, 525;
Harrison v. *Harrison, et al.*, 5 F. (2d) 1001, 1003.

> "The intent of Congress drastically to restrict Federal jurisdiction in controversies between citizens of different states has always been rigorously enforced by the courts."
>
> *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283, 288.

> "Even an appellate court must notice the absence of the elements requisite to original jurisdiction * * *."
>
> *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 288.

And see *U. S. et al.* v. *Corrick*, 298 U. S. 435, 440; *Williams* v. *Nottawa*, 104 U. S. 209; *McNutt* v. *General Motors Acceptance Corporation*, 298 U. S. 178, 184.

> "Diverse state citizenship of the parties * * * is absolutely essential, and cannot be waived, and the want of it will be error at any stage of the cause, even though assigned by the party at whose instance it was committed."
>
> *Chicago, B. & Q. Ry. Co.* v. *Willard*, 220 U. S. 413, 420.

See also:

> *M. C. & L. M. Ry. Co.* v. *Swan*, 111 U. S. 379, 382.

The decision in the Foreclosure Cause (contrary to the decree in the Supplemental and Ancillary Cause) assumes that Phoenix was not an indispensable party to the suit. In this respect, that decision was in conflict with the decisions of the Supreme Court of Iowa if we are also to assume that Phoenix (not Phoenix Finance System, Inc.) was

charged with fraud invalidating both the Deed of Trust and the bonds. In a suit to cancel a mortgage, the Iowa Court has held that all beneficiaries interested in the mortgage debt must be made parties.

Clemons v. *Elder, et al.*, 9 Iowa 272, 275.

The answer in the case at bar demanded cancellation both of the mortgage and of the bonds. In a suit in equity to invalidate a written instrument alleged to be fraudulent, the Iowa decisions hold all parties to it must before the court.

Miller, et al., v. *Mahaffy, et al.*, 45 Iowa 289.

> "The Federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the state unwritten as well as written."
>
> *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 73.

> "The doctrine applies though the question * * * arises not in an action at law, but in a suit in equity."
>
> *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202, 205.

The decision below is in conflict with the decisions of this Court.

In *Shields* v. *Barrow*, 58 U. S. (17 How.) 130, this Court found absence of original jurisdiction after thirteen years of litigation in the lower Federal courts (p. 146). There, as here, it was sought to invalidate a contract, one of the parties to which was of the same state as the party raising the controversy. It was held that "a bill to rescind a contract presents an example" of indispensable parties (p. 139). The presence of each party to the contract is a prerequisite to equity jurisdiction. Equity could make no decree without them. And if, by joinder, one destroyed diversity of citizenship, it ousted jurisdiction of the Federal courts.

To the same effect is *Ribon* v. *R. R. Companies*, 83 U. S. (16 Wall.) 446, 450, holding that where "the interests of those present and those absent are inseparable, the obstacle is insuperable."

See also:

Northern Indiana R. Co. v. *Michigan Central R. Co.*, 55 U. S. (15 How.) 233, 245.

In *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199, 246, 247, this Court said:

> "When it appears to a court of equity that a case, otherwise presenting ground for its action, cannot be dealt with because of the absence of essential parties, it is usual for the Court, while sustaining the objection, to grant leave to the complainant to amend by bringing in such parties. But when it likewise appears that necessary and indispensable parties are beyond the reach of the jurisdiction of the court, or that, when made parties, the jurisdiction of the court will thereby be defeated, for the court to grant leave to amend would be useless. Sec. 2 of Article 3 of the Constitution of the United States."

See also:

Gregory v. *Stetson*, 133 U. S. 579, 587;
Niles-Bement Pond Co. v. *Iron Moulders Union*, 254 U. S. 77, 82;
Trimble v. *Winston Co.*, 56 F. (2d) 150 (C. C. A. 5).

In *Swan Land & Cattle Co.* v. *Frank*, 148 U. S. 603, 610, this Court said:

> "Now, it is too clear to admit of discussion that the various corporations charged with the fraud • • • are necessary and indispensable parties to any suit to establish the alleged fraud • • •."

See also:

Gaylor v. *Kelshaw*, 68 U. S. (1 Wal.) 81, 82;
Nougue v. *Clapp*, 101 U. S 551, 553;
Garzot v. *De Rubio*, 209 U. S. 283, 297
Hill v. *Wilson*, 210 Fed. 200 (C. C. A. 5).

The Judicial Code, Section 37, as amended, imposes a duty upon the Federal courts to dismiss any suit when it appears from the pleadings or the proofs "that such suit does not really and substantially involve a suit or controversy properly within the jurisdiction of said court," as defined by the Constitution and further limited by statute.

Jurisdiction cannot be waived by the parties, and, since the Act of March 3, 1875, the record on jurisdiction will be scanned by the Court *sua sponte*. *Chicago, B. & Q. Ry. Co.* v. *Willard*, 220 U. S. 413, 420. Where clear error, appearing on the face of the record, has occurred in the decision of the Court below on a question of Federal jurisdiction and procedure, the matter is of such importance as to require a review in certiorari to correct it.

George v. *Victor Talking Machine Co.*, 293 U. S. 377, 379;

United States v. *Corrick*, 298 U. S. 435, 440;

Mitchell v. *Maurer*, 293 U. S. 237, 244;

McNutt v. *General Motors Acceptance Corp.*, 298 U. S. 178, 184.

Point III.

A construction of the Decree of December 1, 1936 as denying to Phoenix the right to enforce its claims and to litigate the same in courts having jurisdiction of the parties and of the subject matter, constitutes a deprivation of the property and property rights of Phoenix, in violation of Article V of the Amendments to the Constitution of the United States.

The Fifth Amendment to the Constitution of the United States is in part as follows:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Judicial Department of the Federal Government is necessarily governed in the exercise of its functions by the rule of due process in the Fifth Amendment.

Hovey v. *Elliott*, 167 U. S. 409, 17 S. Ct. 841, 42 L. Ed. 215.

In judicial proceedings, due process of law must be a course of legal proceedings, according to those rules and forms which have been established for the protection of private rights. It must be one that is appropriate to the case and just to the parties affected. It must be pursued in the ordinary manner prescribed by the law. It must give to the parties to be affected an opportunity to be heard respecting the justice of the judgment sought. It must be one which hears before it condemns, proceeds upon inquiry, and renders judgment only after trial.

Hurtado v. *California*, 110 U. S. 516, 4 S. Ct. 111, 28 L. Ed. 232;

Murray v. *Hoboken Land &c. Co.*, 18 How. 272, 15 L. Ed. 372;

Burton v. *Platter*, 53 F. 901;

Thomas v. *District of Columbia*, 90 F. (2d) 424, 67 App. D. C. 179;

Albion-Idaho Land Co. v. *Naf. Irr. Co.*, 97 F. (2d) 439, 444.

Judgments are conclusive only as to parties and their privies but even parties and privies are bound only so far as regards the subject-matter then involved.

1 Cooley's Constitutional Limitations (8th ed.) p. 112.

Thus if certain facts were not necessarily included in the issue, a party is not concluded by the judgment as to them.

Doonan v. *Glynn*, 28 W. Va. 715;

Lorillard v. *Clyde*, 99 N. Y. 196, 1 N. E. 614;

City of Rushville v. *Rushville National Gas Co.*, 164 Ind. 162, 73 N. E. 87, 3 Ann. Cas. 86.

As stated in the case of *Bates* v. *Bodie*, 245 U. S. 520, 38 Sup. Ct. 182, 62 L. Ed. 444, L. R. A. 1918C, 359:

> "And this court has established a test of the thing adjudged and the extent of its estoppel. It is: If the second action is upon the same claim or demand as that in which the judgment pleaded was rendered, the judgment is an absolute bar not only of what was decided, but of what might have been decided. If the second action was upon a different claim or demand, then the judgment is an estoppel 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.' " (citing cases)

If there has been "due process" with respect to a given issue, a decree or judgment on that issue is a complete estoppel. On the other hand, if "due process" as thus defined and applied has not existed, there is no estoppel and a defense of *res adjudicata* in a later suit must of necessity fall.

Point IV.

The Injunction against Phoenix from prosecuting the Delaware actions violates Section 265 of the Federal Judicial Code as well as principles of general Equity Jurisprudence.

Section 265 of the Judicial Code provides:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

A restraint against a party offends against the Section to the same extent as an injunction formally directed against the State Court itself.

Oklahoma Packing Company v. *Oklahoma Gas & Electric Co.* 309 U. S. 4; 60 S. Ct. 215; 84 L. Ed. 329 and cases cited.

Certain exceptions to the rule are enumerated by the Eighth Circuit Court of Appeals in the case of *Equitable Life Assr. Society* v. *Wert*, 102 F. (2d) 10, 14. None of the exceptions therein stated are applicable to the facts here.

Even where the Federal Court has property in its possession, there are limits to the exercise of its power to enjoin. In *Guardian Trust Co.* v. *Kansas City Southern Railway Co.* (C. C. A. 8), 171 Fed. 43, 50, it was stated:

> "• • • the unquestioned rule that the pendency in a state or other court of an action *in personam* which involves no claim to or lien upon specific property in the possession or under the dominion of a national court of equity, and no issue of which that court has acquired exclusive jurisdiction, presents no ground for a dependent bill to stay it." (citing cases).

In the Chancery and law actions in Delaware, no relief is asked "affecting the control, possession or disposition of the res," now in the possession of the receiver of the District Court. No liens, claims or charges against the property are asserted. All the Delaware proceedings are *in personam* only.

Apart from the application of the foregoing Section of the Judicial Code, the decree enjoining Phoenix from prosecuting the Delaware State Court actions was erroneous on well-recognized principles of equity jurisdiction.

High on Injunctions, Sec. 89, succinctly states the rule:

> "The most frequent ground for refusing relief by injunction against a suit at law is that the defense

urged may be used in the action at law itself, without resort to equity. And it may be laid down as a general rule that legal proceedings will not be enjoined on grounds of which the person aggrieved may avail himself in defense of the action at law."

The rule thus stated has the judicial sanction of the Supreme Court:

Creath's Admr. v. *Sims,* 5 How. 191, 12 L. Ed. 111;
Hendrickson v. *Hinckley,* 17 How. 443, 445, 15 L. Ed. 123;
Marine Ins. Co. v. *Hodgson,* 7 Cranch. 332, 3 L. Ed. 362;
Phillips v. *Negley,* 117 U. S. 665, 29 L. Ed. 1013, 6 Sup. Ct. 901;
Knox County v. *Harshman,* 133 U. S. 152, 33 L. Ed. 586, 10 Sup. Ct. 257;
Deweese v. *Reinhard,* 165 U. S. 386, 41 L. Ed. 757, 17 Sup. Ct. 340;
Truly v. *Wanzer,* 46 U. S. (5 How.) 141, 12 L. Ed. 88;
Scottish U. & N. Ins. Co. v. *Bowland,* 196 U. S. 611, 49 L. Ed. 619, 25 Sup. Ct. 345.

See also:

5 *Pomeroy's Equity Jurisprudence* (4th ed.) Sec. 2059, pp. 4650-4651, and other cases cited.

In the Delaware cases, the Bridge Company not only has available the legal defense of *res adjudicata,* but in each case it has appeared generally and has formally pleaded that defense. In the $3,125-$2,000 notes case (Defendant's Exhibit S. C. 101, R. 385, Summary Statement (b) 1, p. 7, *supra*), it formally pleaded this defense (R. 422), it offered evidence in support thereof, and through its counsel briefed and argued it. The opinion of the court deals solely with that defense (14 Atl. (2d) 386).

Point V.

The Delaware Court of Chancery has Exclusive Jurisdiction to hear and determine the issues involved in the proceeding in that court (Summary Statement (b) 5).

In the Delaware Chancery cause, Phoenix is not suing to recover the stock because of the invalidating of the bonds received therefor. *Phoenix is seeking to recover the stock because there was an impairment of Bridge Company capital at the time of the purchase by it of its own stock, and because of the violation of charter provisions.*

Phoenix has tendered in the Delaware action the bonds received for the stock. The Bridge Company is defending upon the doctrine of estoppel or *res adjudicata.*

Because both corporations are domiciled in Delaware, no Federal Court has or can have jurisdiction. This is a matter relating peculiarly to the internal affairs of a Delaware corporation.

2105 Section 73 of the Revised Code of Delaware, 1935, provides:

> "For all purposes of title, action, attachment, garnishment and jurisdiction of all courts held in this State, but not for the purpose of taxation, the situs of the ownership of the capital stock of all corporations existing under the laws of this State, whether organized under this Chapter or otherwise, shall be regarded as in this State."

This Section has been construed in the following cases:

Wightman v. *San Francisco Bay Toll Bridge Co.*, 16 Del. Ch. 200, 142 A. 783;

Hunt v. *Drug, Inc.*, 5 W. W. Harr. 332 (Del.), 156 A. 384;

Bouree v. *Trust Francais*, 14 Del. Ch. 332, 127 A. 56;

Rojas-Adam Corp. v. *Young*, 13 F. (2d) 988;

Hodgman v. *Atlantic Refining Co.*, 274 Fed. 104;
Kling v. *McTarnahan* (Mass. 1931), 178 N. E. 831;
O'Hara v. *Frenkil* (Md. 1928), 155 Md. 189, 141 A. 528.

Only in the State of Delaware can jurisdiction be obtained for an action involving the internal affairs of a Delaware corporation. Where the act complained of affects the complainant solely in his capacity as a stockholder and is the act of the corporation, the same concerns the internal affairs of the corporation and the courts of a jurisdiction foreign to the state of incorporation (State or Federal) will not take jurisdiction even though the tangible property of the corporation be situate therein.

Kansas &c. Const. Co. v. *Topeka S. & W. R. Co.*, 135 Mass. 34, 46 Am. Rep. 437;
17 Fletcher's Cyclopedia on Private Corporations (1933), p. 396.

In *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123, 130, 77 L. Ed. 652, 656, the Supreme Court said:

> "It has long been settled doctrine that a court—State or Federal—sitting in one State will as a general rule decline to interfere with or control by injunction or otherwise the management of the internal affairs of a corporation organized under the laws of another State but will leave controversies as to such matters to the courts of the State of the domicile."

See also:

Alm v. *American Hair & Felt Co.*, 91 F. (2d) 354 (C. C. A. 7);
Swift v. *Richardson*, 7 Houst. 338, 6 A. 856;
Mau v. *Montana-Pacific Oil Co. et al.*, 16 Del. Ch. 114, 141 A. 828;
In re *Fryeburg Water Co. (N. H.)*, 106 A. 225;
Kimball v. *St. Louis & S. F. R. Co.*, 157 Mass. 7, 31 N. E. 697;
Jackson v. *Hooper*, 76 N. J. Eq. 592, 604, 75 A. 568; 27 L. R. A. (N. S.) 658.

The Supreme Court of Michigan in the recent case of *Wojtczak* v. *American United Life Ins. Co.*, 292 N. W. 364 (June 3, 1940) reviewed the authorities including many of the foregoing on this point and quoted with approval from *Rogers* v. *Guaranty Trust Co., supra.*

The application of the principle above enunciated to the facts of the case *sub judice* is clear. In the Delaware Chancery action, Phoenix is complaining of an act which affects it solely in its capacity as a stockholder of the Bridge Company. The act complained of, viz., a transaction in violation of the corporate charter and of the Delaware statutes, is the act of the Bridge Company through its board of directors.

Point VI.

By reason of the equitable maxim: "He who seeks equity must do equity," and the particular application thereof known as "Lord Redesdale's Rule," the Bridge Company by its bill of complaint supplemental and ancillary to the foreclosure decree was required to show that such decree was a "right" one and Phoenix by its answer and counterclaim and by evidence in support thereof was entitled to show that such decree should not be implemented.

The Supplemental and Ancillary Bill seeks to enjoin, and the decrees below do in fact enjoin, Phoenix from asserting certain *bona fide* claims. These claims are all parcel of a general account between the parties shown with great certainty and clarity by defendant's rejected Exhibit S. C. 114 (R. 595-693). Those claims are further explained by paragraphs 17 to 38 of the Answer and Counterclaim of Phoenix (R. 153-164 stricken by the District Court) (R. 171). By its Supplemental and Ancillary Bill, it is the Bridge Company that is now "seeking equity."

The general principle underlying the maxim is of such universal recognition that it need not be again stated. See

Thomas Tr. v. *Brownville, &c., R. Co. et al.*, 109 U. S. 522, 27 L. Ed. 1018.

In the case of *Union Central Life Ins., &c., Co.* v. *Drake*, 214 Fed. 536, 548 (C. C. A. 8th), the court said (p. 548):

> "* * * A court of equity may always require him who seeks equity to do equity, and in a case in which the rules and principles of equity demand it, as they do in the case at bar, it may condition the grant of relief sough from it by a plaintiff with the enforcement of a claim or an equity held by a defendant which by reason of the statute of limitations or a former judgment the latter could not enforce affirmatively or in any other way. Pomeroy's Equity Juris. Secs. 386, 393, note 4; Brent *v.* Bank of Washington, 10 Pet. 596, 9 L. Ed. 547: Farmers' Loan & Trust Co. *v.* Denver, L. & G. R. Co., 126 Fed. 46, 51, 52, 60 C. C. A. 588, 593, 594, and cases there cited and reviewed; Central Improvement Co. *v.* Cambria Steel Co., 201 Fed. 811, 824, 120 C. C. A., 121, 135."

In the same circuit, see also:
Levy v. *S. H. Kress & Co.*, 285 Fed. 836, 839 (1922), 296 Fed. 697;
U. S. v. *Debell*, 227 Fed. 775, 779 (1915).

In the application of the maxim as a defense to the relief prayed, this case is governed by a rule, universally recognized and commonly referred to as "Lord Redesdale's Rule," in tribute to the statement of the rule by that famous Chancellor (author of Mitford's Chancery Pleadings) in *Hamilton* v. *Houghton*, 2 Bligh. 169, 4 Eng. Rep. 290:

> "The party who comes into a court of equity to have the benefit of a former decree must show that it was a right decree, if the decree appears to be erroneous, the Court cannot carry it into execution."

The rule is stated in even more emphatic form by Lord Chancellor Sugden in O'Connell v. M'Namara, 3 Dr. & War. 411.

The rule has received unquestioned recognition in the Supreme Court—

Lawrence Mfg. Co. v. *Janesville Cotton Mills*, 138 U. S. 552, 34 L. Ed. 1005;

O'Brien v. *Wheelock*, 184 U. S. 450, 46 L. Ed. 638;

Lewers & Cooke v. *Atcherly*, 222 U. S. 285, 56 L. Ed. 202 (1911).

It is submitted that on the Supplemental and Ancillary Bill, the Bridge Company was required to show that the decree in the Foreclosure Cause was a "right" one and Phoenix was entitled to show the contrary. Phoenix was also entitled to show circumstances of fraud and mutual mistake contributing to making that decree capable of implementation. In addition, Phoenix and its predecessors in interest had advanced large sums to the Bridge Company or for its benefit and the money so advanced remains unpaid. Under these same authorities, the court below should have compelled the Bridge Company to do equity and to repay to Phoenix the sum by which it has been unjustly enriched. If this were not the law, we would have the absurd result that the rights of the Bridge Company upon this Supplemental Bill would be greater than they would have been upon an original bill or upon a cross-bill for affirmative relief in the original proceedings.

Point VII.

The scope of the decree in the Supplemental and Ancillary Proceedings is broader than the decree in the Foreclosure Cause and in effect substantially "pieces out" that decree. The case is a typical one for the application of "Lord Redesdale's Rule."

The essential part of the final decree in the Foreclosure Cause is as follows:

> "That the bill of the plaintiffs be dismissed as to the plaintiff, Phoenix Finance Corporation, and that

> the prayer of the bill be denied, except insofar as the decree provides for the protection of the holders of said $15,000.00 in bonds. *That foreclosure and sale of the mortgage property be denied* * * *."

The scope of the decree as appears from the above portions thereof is an exceedingly narrow one. It is not claimed by the Bridge Company that this decree was not carried into effect or in any way requires implementation. There has been no other attempt by the Trustee under the deed of trust to foreclose in any other form. It is true that Phoenix as a creditor of the Bridge Company on certain underlying indebtedness has brought suit in the courts of Delaware. These suits are in no way enjoined by the decree in the Foreclosure Cause. It is accordingly urged that in filing the Supplemental and Ancillary Bill, the Bridge Company sought to enlarge and "piece out" the original decree far beyond its original scope. To do this, it must show that the decree is a "right" one under the principle of "Lord Redesdale's Rule."

The decree of March 23, 1940 in the Supplemental and Ancillary Cause enjoins and restrains Phoenix from prosecuting or carrying forward any and all of the actions of law and equity instituted by Phoenix against the Bridge Company in Delaware. The issues involved in the cases pending in the courts of Delaware, and the issue that would be involved if the $50,000 "open" mortgage were sought to be enforced for the total obligation of $59,000, are in no way directly treated in the decree denying foreclosure of the deed of trust and dismissing the bill for foreclosure.

The mortgage dated March 10, 1931 executed by Iowa-Wisconsin Bridge Company and recorded in Allamakee County, Iowa and Crawford County, Wisconsin was not in issue in the Foreclosure Cause, is not referred to in any

decree in that cause, and was in fact not recorded in the two jurisdictions until June 2, 1939 in Allamakee County, Iowa, and May 18, 1939 in Crawford County, Wisconsin. The Supplemental and Ancillary Bill seeks, and the decree by mandatory order directs, Phoenix to satisfy this recorded mortgage and to deliver the note for $50,000 for which it is secured to the Court for cancellation. The note for $50,000 was not an exhibit in the Foreclosure Cause and there is no reference anywhere in the findings of fact of the Master or of the Court as to the existence of such a note. It is submitted that a decree which now directs Phoenix to satisfy a mortgage which was not involved in the Foreclosure Cause and to deliver up for cancellation a note, the existence of which is unknown to the record of the Foreclosure Cause, is necessarily an enlargement and "piecing out" of the original decree.

Again, the appellant urges that there was no issue in the Foreclosure Cause as to the right of Phoenix, as an involuntarily impleaded party plaintiff, to recover or have restored to it by the Bridge Company defendant the 517 shares of Bridge Company preferred stock which had been delivered to the Bridge Company in exchange for certain of the bonds secured by the deed of trust, the foreclosure of which was sought. *In the Delaware Chancery action, Phoenix is not seeking to recover these shares because the consideration for the exchange has been invalidated by the decree of December 1, 1936, but on entirely separate and distinct issues*, both of law and of fact. The mandatory order in this cause directing Phoenix to dismiss the Delaware Chancery action must of necessity be regarded as an enlargement of the scope of the decree in the Foreclosure Cause, not only because that decree does not deal with the subject, but also because the issues involved are entirely different.

It cannot be here said, as was stated by the court in the case of *Utah Power & Light Co.* v. *U. S.*, 42 F. (2d) 304, in refusing to apply Lord Redesdale's Rule as approved in *Lawrence Mfg. Co.* v. *Jamesville Cotton Mills, supra*, that—

> "No modification of the former decree is sought. The plaintiff stands on the decree as it is and the case is not one in which a new trial of the former action can be had."

This case is rather one for the application of Lord Redesdale's Rule in supplementary proceedings to enlarge a decree. See the case of *Gay* v. *Parpart*, 106 U. S. 679, 27 L. Ed. 256, wherein the Supreme Court approved of the following language of the Illinois Supreme Court:

> "We do not regard that it militates with the doctrine of the conclusive effect of what is *res adjudicata* that where there is an *incomplete decree* and it is ineffective for want of the provision of any means for its execution, and an application is made to a court of equity to supply the imperfection so as to render the decree effective, then it is admissible to look at the real nature and character of the decree as it may appear in the light of surrounding circumstances for the purpose of determining whether there is such an equitable ground for action as will move a court of equity to interpose. Equity will penetrate beyond the covering of form and look at the substance of a transaction and treat it as it really and in essence is, however it may seem."

The very fact that the question before this Court has been raised by the filing of a *Supplemental* Bill in the court below is indicative that the Bridge Company seeks an enlargement of an earlier decree. The very nature of a supplemental bill requires a change of the original decree. This is rudimentary pleading. See Volume 21, *Encyclopedia of Pleading and Practice*, pp. 70-71, where it is stated:

> "Where it does not appear from the supplemental bill that there is any alteration in the interests of the parties, or that there are any particular circumstances

> requiring further discovery, and the subsequent matter alleged is not such as to vary the relief sought under the original bill, the supplemental bill is bad."

It is also apparent that the *degree* of change in an earlier decree sought by the filing of a supplementary bill is not important so long as some additional relief is sought.

In the case of *Lewers and Cooke* v. *Atcherly*, 222 U. S. 285, 56 L. Ed. 202, an earlier decree ordered the conveyance of property to appellant's predecessor in title. In the later proceedings, the appellant prayed in his bill that title to the property be registered and that the title be confirmed. While this relief was virtually the same as that originally sought by appellant's predecessor in title, the Supreme Court stated that under such circumstances the appellants were in "the same position as a party asking the aid of a Court of Chancery in executing a former decree, and it is well established that he must take the risk of opening up such decree for re-examination." Citing *Lawrence Mfg. Co.* v. *Janesville Cotton Mills, supra.*

In the case of *American Radium Co.* v. *Hipp Didisheim*, 279 Fed. 601, the original decree failed to provide that its benefits should run to the successors or assigns of the original plaintiff. Ancillary proceedings were brought by one other than the original plaintiff to obtain the fruits of the earlier decree and also asking for an accounting. The Court applied the rule of *Lawrence Mfg. Co.* v. *Janesville Cotton Mills, supra*, and decided that the original decree was not *res adjudicata* and that the case must be considered on its merits.

In the case of *O'Brien* v. *Wheelock*, 184 U. S. 450, 46 L. Ed. 636, the Court denied the relief sought in the ancillary and supplementary proceedings largely on the grounds of *laches*, but it declared that it had the power to inquire into the nature of a supplemental bill. The only material change in the supplementary proceedings was that landowners, some

of whom had acquired land involved in the original proceedings many years after the original decree, were brought in as parties to the supplementary proceedings.

It is submitted that the Court below has destroyed the equitable principle inherent in Lord Redesdale's Rule by refusing to apply it to a supplementary and ancillary bill which seeks supplemental and additional relief based upon facts that had not occurred and were not even in contemplation at the time of the decree in the Foreclosure Cause.

Point VIII.

The District Court in the Supplemental and Ancillary Proceeding should, when raised by way of defense, have taken cognizance of the tendered proof of fraud inherent in its own decree.

As a corollary to Lord Redesdale's Rule, it is held that a party may attack a judgment obtained by fraud in any subsequent proceeding thereon. The District Court, therefore, erred in rejecting the tendered proof of fraud inherent in its decree in the Foreclosure proceedings as a result of conduct on the part of the Bridge Company, the interveners, and their counsel.

Webster v. *Reid*, 11 How. 437, 13 L. Ed. 761.

There is a clear and well established distinction between those cases where a party is seeking *affirmatively* to have a judgment or decree set aside on the ground of fraud and those cases (like the case *sub judice*) where a party is *defending* against a suit to enforce the alleged fraudulent judgment or decree. Cases in the former category seem to hold generally that fraud to be available in an *affirmative* attack upon a decree must be extrinsic to the issues.

U. S. v. *Throckmorton*, 98 U. S. 61, 25 L. Ed. 93;
Marshall v. *Holmes*, 141 U. S. 589, 35 L. Ed. 870;
Atchison T. & S. F. Ry. Co. v. *U. S., etc.*, (C. C. A. 8) 106 F. (2d) 899.

In cases of the latter category, however, the *defending* party may offer any available evidence to show that the decree sought to be enforced is not a "right" one. This brings us back again to the application of "Lord Redesdale's Rule," discussed *supra*. See also *Publicker* v. *Shallcross* (C. C. A. 3), 106 F. (2d) 949, wherein the Court stated as to the maxims "*interest rei publicae ut sit finis litium*" and "*memo debet bis vexari pro una et eadam causa:*" "We believe truth is more important than the trouble it takes to get it."

Even if the rule of the *Throckmorton* case was controlling in the case of a party *defending* against the enforcement of an alleged fraudulent decree, nevertheless the evidence tendered in the court below comes within an express exception to the rule of that case. The Supreme Court speaking through Mr. Justice Miller stated that one of the grounds "for which a new suit may be sustained to set aside and annul the former judgment or decree and open the case for a new and fair hearing * * *" was "*where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent.* * * *" (Emphasis supplied.)

This exception is well emphasized in the case of *Chicago R. I. & P. Ry. Co.* v. *Callicotte* (C. C. A. 8), 267 Fed. 799.

Particularly is the exception stated by Mr. Justice Miller applicable here. Phoenix, the unsuccessful party in the Foreclosure Cause, was prevented from fully exhibiting its case by reason of three circumstances, with respect to only the first of which it can be said to be at fault to any extent: (1) because of the misunderstanding, or rather the tacit understanding with respect to the two-stage theory, (2) when the procedural error became evident, it was denied relief on petition for rehearing because of false representations of opposing counsel accepted by the Court with re-

spect to its alleged failure to produce books as ordered, and (3) the circumstance of extrinsic fraud stated in paragraph 44 of the Answer and Counterclaim of Phoenix (R. 166).

Conclusion.

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory power in order that the aforesaid manifest error may be corrected, the courts below limited to their proper jurisdiction and the petitioner accorded due process in the ligitation of its *bona fide* claims. To this end, a writ of certiorari should be granted so that this Court may review the decision of the Circuit Court of Appeals for the Eighth Circuit and ultimately, and after further argument, reverse the same.

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Of Counsel.

IN THE SUPREME COURT OF THE STATE OF DELAWARE

OCTOBER TERM, 1940

No. 4

IOWA-WISCONSIN BRIDGE COMPANY, A CORPORATION OF THE STATE OF DELAWARE

Defendant below
Plaintiff in Error

vs.

PHOENIX FINANCE CORPORATION, A CORPORATION OF THE STATE OF DELAWARE

Plaintiff below
Defendant in Error

This Is To Certify that writ of error captioned as above and bearing the above term number was docketed in this Court by Iowa-Wisconsin Bridge Company, the defendant below, plaintiff in error, on the 9th day of September, 1940; that the appearance of James R. Morford of the firm of Marvel & Morford, Wilmington, Delaware, was entered as attorney for Phoenix Finance Corporation, the plaintiff below, defendant in error, on the 11th day of September, 1940; that said writ of error is pending argument in the Supreme Court of the State of Delaware and will be regularly calendared for argument at the January Term of said Court convening on the third Tuesday in January,

1941. I further certify that Rule 24 of the Supreme Court of the State of Delaware provides as follows:

> "All causes, except applications for writs of mandamus or prohibition, shall be deemed to be at issue upon the appearance of the defendant in error or appellee."

In Witness Whereof, I have hereunto set my hand and the Seal of the Supreme Court of the State of Delaware, this 30th day of November, A. D. 1940.

W. MARION STEVENSON,
Clerk of the Supreme Court
of the State of Delaware.

[Seal.]

IN THE

Supreme Court of the United States

October Term, 1940.

No. 624.

PHOENIX FINANCE CORPORATION, a Corporation of the State of Delaware,

Petitioner,

v.

IOWA-WISCONSIN BRIDGE COMPANY, a Corporation of the State of Delaware,

Respondent.

BRIEF FOR PETITIONER.

JAMES R. MORFORD,
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MARVEL & MORFORD,
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FOREWORD.

The primary question herein as to the scope and legal effect of the alleged former adjudications, including the defense of *res adjudicata* and thereby involving the Full Faith and Credit Clause (U. S. Const., Art. IV, Sec. 1), has heretofore been decided adversely to the respondent by the Superior Court of Delaware.

> *Phoenix Finance Corporation v. Iowa-Wisconsin Bridge Co.*, 14 Atl. (2d) 386.

Writ of error to the Supreme Court of Delaware was taken by the defendant (the respondent herein) (No. 4 October Term 1940). Case briefed and argued orally on January 30, 1941 (see Clerk's Certificate in Appendix) and is pending decision.

The above cited Superior Court case is the law of the State of Delaware pending the decision of the Delaware Supreme Court.

> *West v. American T. & T. Co.*[1] (not yet officially reported; Decision Dec. 9, 1940, Nos. 44, 45).

Accordingly, there exists a conflict between the law of the State of Delaware and the law as announced in the Eighth Federal Circuit (115 Fed. (2d) 1; 32 Fed. Supp. 277) in the cause to which this writ of certiorari is directed.

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[1] 61 S. Ct. 179; 85 L. ed. 146.

IN THE

Supreme Court of the United States.

No. 624. October Term 1940.

PHOENIX FINANCE CORPORATION, A CORPORATION OF THE STATE OF DELAWARE,

Petitioner,

v.

IOWA-WISCONSIN BRIDGE COMPANY, A CORPORATION OF THE STATE OF DELAWARE,

Respondent.

BRIEF FOR PETITIONER.

OPINIONS BELOW.

The opinion of the District Court below (R. 717-722) dated March 23, 1940, is reported in 32 Fed. Supp. 277. The opinion of the Circuit Court of Appeals (R. 767-787) is reported in 115 Fed. (2d) 1. The granting of certiorari herein is not yet officially reported.[1]

The attention of the court is directed to a case in the Superior Court of Delaware between the same parties and involving the same principal subject matter opposed to the foregoing (*Phoenix Finance Corporation v. Iowa-Wisconsin Bridge Company*, 14 Atl. (2d) 386). This case is pending decision on writ of error to the Delaware Supreme Court (see Clerk's Certificate in Appendix).

[1] Granted January 20, 1941; 85 L. ed. 392.

In the Mortgage Foreclosure Cause [2] to which the proceedings below were supplemental and ancillary, the opinions of the District Court and Circuit Court of Appeals are reported in 19 Fed. Supp. 127 and 98 Fed. (2d) 416 respectively. In that cause, certiorari to this Court was denied (No. 438 October Term 1938; 305 U. S. 650, 676).

JURISDICTION.

Writ of certiorari was prayed and granted herein pursuant to the authority of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938; 28 U. S. C. A., Sec. 347 (a)).

The reasons relied on for the exercise by this Court of its judicial discretion under the above cited Section were stated in subheading IV of the Petition for Writ of Certiorari (pp. 14-19). Upon the reasons thus stated, this Court has granted certiorari.

QUESTIONS PRESENTED.

Basically, there is involved herein the construction by the Supreme Court of the decree of December 1, 1936, in the Foreclosure Cause in the District Court (F. R. 156) as affirmed by the decree (F. R. 1709) and mandate (R. 697) of the Circuit Court of Appeals in that cause. The two major questions as to the effect of the foreclosure decree relate to: (1) the effect of that decree as an adjudication against Phoenix, an involuntarily impleaded party complainant, of Phoenix' legal claims on notes, contracts and open accounts, and Bridge Company's unpleaded counterclaims or set-offs with respect thereto, and (2) the right of Phoenix as the defendant in the Supplemental and An-

[2] This record, designated and distinguished as "Foreclosure Record" or "F. R." is an exhibit to and part of the record herein.

cillary Cause to challenge the Foreclosure decree under "Lord Redesdale's Rule."

Primarily, therefore, it is the petitioner's contention that the District Court in the Foreclosure Cause was without jurisdiction to adjudicate against it in a cause (1) where it was but a "formal" party (F. R. 211), and (2) where such purported adjudication was not responsive to issues involved. The construction of a prior decree involving a determination of the scope of the jurisdiction of the court rendering the prior decree is a proper matter to be considered by the Supreme Court on writ of certiorari.

St. Louis, etc., Railroad Company v. Wabash Railroad Company, etc., 217 U. S. 247;
Baltimore & Ohio R. R. v. Parkersburg, 268 U. S. 35;
KVOS, Inc. v. Associated Press, 299 U. S. 269.

The existing conflict between the Circuit Court of Appeals and the Superior Court of Delaware (14 Atl. (2d) 386) and, in the event of an affirmance on pending writ of error, the Supreme Court of Delaware [3] relating to the construction and legal effect of the decree of December 1, 1936, in the Foreclosure Cause, is an important consideration calling for review by the Supreme Court of the decrees below.

Forsyth v. Hammond, 166 U. S. 606.

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[3] See Certificate of Clerk of Supreme Court in Appendix.

STATEMENT OF THE CASE.

Preliminary Statement.

As an initial approach to a consideration of the case the Court is respectfully referred to the "Summary Statement" as contained in the Petition for Writ of Certiorari. The statement of *detailed* facts as hereinafter contained is necessarily enlarged and extended to include *all* facts deemed material to a consideration of the questions now before the Court under alternative arguments. Such facts are stated herein as concisely as the nature of the case and the size of the *two* Records will permit.

Nature of the Cause of Action and the Scope of the Decree to Which Certiorari Is Directed.

The cause of action in the District Court below was on Supplemental and Ancillary Bill of Complaint (R. 3) [1] in which Iowa-Wisconsin Bridge Company, a Delaware Corporation (herein sometimes referred to as "Bridge Company"), was complainant and Phoenix Finance Corporation, a Delaware Corporation (herein sometimes referred to as "Phoenix"), was defendant. The Supplemental and Ancillary Bill was filed for the alleged purpose of making effective and securing to the Bridge Company the supposed fruits and benefits of a decree in the District Court dated December 1, 1936 (F. R. 202; R. 66) [1] in a cause of action in equity for mortgage foreclosure filed by the Trustees of a certain mortgage deed of trust, as the

[1] Wherever in this brief record reference is designated as "R" the printed record on Certiorari to the Supreme Court of the United States is intended. Whenever the record reference is designated as "F. R." the printed record on appeal to the Circuit Court of Appeals for the Eighth Circuit in the Mortgage Foreclosure Cause is intended. The "Foreclosure Record" is an exhibit to the "Record" in this cause.

complainant-mortgagees and to which the Bridge Company, as the mortgagor, was defendant (F. R. 1).

The status of Phoenix Finance Corporation, a bondholder, subsequently brought in involuntarily as a "formal" party (F. R. 210-211; 19 Fed. Supp. 127) complainant (F. R. 85) in said Foreclosure Cause, the issues of said cause and the scope and legal effect of said decree of December 1, 1936, *denying foreclosure* are matters of principal importance herein.

Phoenix as the holder of more than 25% of the bonds secured by the deed of trust had requested the Trustees to foreclose, Exhibit 28 (H. E. B.); F. R. 789-791). The deed of trust specifically provided for foreclosure in the event of default, upon the written request of the holders of 25% in principal amount of the bonds in respect of which default existed (F. R. 35, Sec. 2 (b)). In the request for foreclosure Phoenix agreed to secure and indemnify the Trustees against costs, expenses and liabilities incurred by them in connection with the proposed action (F. R. 790). Phoenix also requested the Trustees to retain designated counsel and agreed to indemnify the Trustees "for fees and expenses in connection with the litigation" (Exhibit B (H. E. B.), F. R. 794).

The agreement to indemnify the Trustees for costs and expenses is explained by the testimony of the Vice President of the corporate trustee (F. R. 537):

> "Before taking any action in the foreclosure, we asked the Phoenix Finance if they would protect us against expense and indemnify us against costs. We have the Phoenix Finance Corporation's agreement to pay costs of foreclosure, and the deposit with us at that time. • • •

> Following the designation by Phoenix Corporation of the attorneys to act in the foreclosure of the bonds and the guaranteeing of the expenses in connection therewith, we designated the said attorneys named by them, and the litigation has proceeded under the supervision of said attorneys."

The Supplemental and Ancillary Bill sought (1) injunction, both temporary and permanent, against Phoenix from prosecuting or carrying forward certain actions (five at law and one in equity) in the courts of the State of Delaware, (2) an injunction, both temporary and permanent, against Phoenix from instituting or carrying forward any other actions either in Delaware or elsewhere, (3) a mandatory order requiring Phoenix to dismiss the Delaware actions, (4) an injunction, both temporary and permanent, against Phoenix from foreclosing or otherwise acting with respect to certain $50,000 [2] mortgage on Bridge Company property located in Iowa and Wisconsin and given by Bridge Company to Phoenix Finance System, Inc., under date of March 10, 1931, and (5) a mandatory order requiring Phoenix to satisfy said mortgage both in Iowa and Wisconsin and to surrender to the District Court for cancellation said mortgage and the note secured thereby (R. 11-12).

Preliminary injunction with mandatory order as prayed was granted (R. 132) two days before the Answer of Phoenix was due or filed. Phoenix thereupon filed its Answer and Cross-Bill which upon motion was stricken by

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[2] This mortgage is not to be confused with the $200,000 mortgage deed of trust which was the subject matter of the Foreclosure Cause. The $50,000 mortgage was security for further advances over and above the original loan of $50,000. The $9,000 item hereinafter mentioned is a part of such further advances.

order of the District Court[3] (R. 749). Phoenix next filed its Answer and Counterclaim (R. 146) and certain portions thereof were, upon like motion, stricken by order of the District Court (R. 171).

Pursuant to the rules of the District Court for the Northern District of Iowa, Phoenix thereupon gave notice of intention to take the depositions of certain witnesses (R. 172) including George E. Preuss, Edgar S. Gage, Lee J. Skoner, Albert Penn and John A. Thompson. In due course and in conformity with the Rules of Civil Procedure, Phoenix gave further notices of the times and places of the taking of the depositions of said witnesses (R. 173, 174, 224, 225), whereupon the Bridge Company moved for and obtained temporary stays and, upon hearing, final orders that said depositions be not taken (R. 184, 223, 232, 256). To each such motion, Phoenix filed a comprehensive resistance (R. 192, 238) which contained full and complete schedules of the testimony of all such witnesses with relevant exhibits were set out.[4]

Upon final hearing, Thompson, Penn and Skoner together with one Emory H. English were produced as wit-

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[3] In view of the fact that allegations of the same general import as contained in the Answer and Cross-Bill of Phoenix were likewise stricken by order of the District Court from the subsequent Answer and Counterclaim of Phoenix, the petitioner has omitted said Answer and Cross-Bill and the motions and order for the striking of the same from the record. Any error in the order striking the Answer and Cross-Bill is implicit in the order striking portions of the New Answer and Counterclaim, in the order denying to Phoenix the right to take certain depositions and in the rulings of the District Court denying to Phoenix the right to offer any testimony on its behalf.

[4] See the following schedules of testimony: John A. Thompson, R. 205; Albert Penn, R. 197; Lee J. Skoner, R. 221; Edgar S. Gage, R. 218, and George E. Preuss, R. 217. See also as an exhibit to the first such Resistance the report of Special Examination of the accounts of Iowa-Wisconsin Bridge Company entitled: "Receipts and Disbursements, Iowa-Wisconsin Bridge Company, Lansing, Iowa, November 1, 1930 to September 25, 1933," as prepared by said Preuss of Ernst & Ernst, Accountants and Auditors, Chicago, Illinois, under the direction of the said Skoner (R. 218, 222, 595-693). This same exhibit was offered in evidence as Defendant's Exhibit SC114 (R. 292).

nesses on behalf of Phoenix. Their tendered testimony was rejected by the District Court (R. 286-287, 291, 292). At the final hearing there were offered in evidence complete exemplified copies of the Delaware proceedings (Defendant's Exhibits S. C. 101, R. 385; S. C. 102, R. 440; S. C. 103, R. 482; S. C. 104, R. 522, and S. C. 105, R. 546). The exact nature and present status of each such action is more fully set forth under an appropriate heading of this Statement. The $50,000 mortgage showing the recording thereof in Allamakee County, Iowa, and in Crawford County, Wisconsin, is in evidence as Bridge Company's Exhibits S. C. 6, R. 374, and S. C. 7, R. 379.

Phoenix' primary defense was one of law, viz, that the decree in the Foreclosure Cause did not and legally could not constitute an adjudication against it with respect to said Delaware actions and with respect to said $50,000 mortgage and note. Phoenix' secondary defense as raised by the stricken portion of its Answer and Counterclaim and the tendered and rejected testimony of its witnesses, was want of equity, unclean hands and the particular application of said defenses in supplemental proceedings known as "Lord Redesdale's Rule." By the allegations thus stricken and the evidence thus rejected Phoenix sought to show that the Foreclosure decree was not a "right" one, that the same was induced by misrepresentations and fraudulent tactics on the part of intervener, his counsel and an associate and that the Bridge Company, as complainant in the Supplementary and Ancillary Cause, was in court with unclean hands and had failed to do equity (R. 272-292).

Due to the striking of a large part of the Answer and Counterclaim of Phoenix, the denial of its right to take

depositions and the rejection of evidence offered at the hearing, the decree of the District Court (R. 719) was in practical effect a judgment on the pleadings against Phoenix. *The District Court decided adversely to Phoenix, its primary contention that the Foreclosure decree was not a valid adjudication against it.*

By the Findings of Fact, Conclusions of Law (R. 700) and Memorandum Opinion (R. 717), the District Court held as follows:

1. That all of the issues and controversies involved in the Supplemental and Ancillary Bill were litigated in the Foreclosure Cause and were adjudicated adversely to Phoenix by the decree of December 1, 1936.

2. That although Phoenix was but a "formal" party in said Foreclosure Cause, it nevertheless was "represented" by the Trustee Complainants and that all of its claims against the Bridge Company (including unpleaded setoffs and counterclaims of the Bridge Company against it) had been fully adjudicated.

By the final decree of the District Court dated March 23, 1940 (R. 719), and the writ issued in pursuance thereof. the following injunctive and mandatory orders were made against Phoenix:

1. That it be permanently enjoined and restrained from prosecuting, conducting or carrying forward in any manner whatsoever any and all of the Delaware actions.

2. That it forthwith dismiss all said actions at its own cost.[5]
3. That it release, satisfy and remove from record both in Allamakee County, Iowa, and Crawford County, Wisconsin, said $50,000 mortgage of March 10, 1931.
4. That it deliver the original of said mortgage and the note secured thereby to the Clerk of the District Court for cancellation.
5. That it be permanently enjoined and restrained from commencing, prosecuting or bringing in question, or in any manner carrying forward any suits or causes of action claimed to be involved in the Findings of Fact and Conclusions and Decree of December 1, 1936, and Order denying rehearing and modification of March 4, 1937.

The decree of the District Court was affirmed by the Circuit Court of Appeals for the 8th Circuit (R. 787; opinion, R. 767).

The Parties, Pleadings, Issues and Decree in the Foreclosure Cause.

The cause to which the proceedings below were supplemental and ancillary was typically one for the foreclosure of a deed of trust. The deed of trust covered real and personal property of the Bridge Company located in the States of Iowa and Wisconsin. The complainants were the

[5] The Delaware law action described in paragraph (a) of the decree (R. 720) had theretofore on March 18, 1940 been decided by the Superior Court of Delaware in favor of Phoenix and judgment entered against the Bridge Company (14 Atl. 2d 386). The sole defense in that action was *res adjudicata* based upon the decree of December 1, 1936 in the Foreclosure Cause. The court rejected the plea. This case argued on Writ of Error to Supreme Court of Delaware January 30, 1941 and decision is now pending. (See Certificate of Clerk in Appendix.)

Trustees created by the deed of trust. One trustee was a corporation of Iowa, the other an individual, a citizen and resident of Wisconsin. The Bridge Company, defendant, is a Delaware corporation. *Therefore Federal jurisdiction as to the issue of mortgage foreclosure existed.*

The bill of complaint (F. R. 1-11) prayed (1) for an account of all the property in the District subject to the lien of the mortgage deed of trust and that the same be declared a valid lien thereon; (2) that an account be taken of the bonds and interest coupons secured by the mortgage deed of trust and that the defendant be decreed to pay to the complainants the amount found to be due on such accounting and in default of payment that the mortgaged property be sold under decree of court; (3) that any bondholder or any committee of bondholders or the complainants might bid for and purchase the property at said sale; (4) for a deficiency judgment in the event the proceeds of the sale should not be sufficient to satisfy the decree in full; (5) for the appointment of a receiver of the property; (6) that the account of the complainants, as Trustees, be examined and approved; and (7) for general relief.

The Bridge Company by its answer to the bill for foreclosure (F. R. 62-66) denied "that said mortgage deed of trust is a valid and binding lien upon the property as alleged in the complainants' bill." The answer also stated that "defendant believes that a large portion of said bonds were improperly executed and delivered," that the management of the Bridge Company had been controlled by persons who were officers or stockholders of Phoenix Finance System, Inc. (not Phoenix Finance Corporation, the petitioner), that all transactions between the Bridge Company and Phoenix Finance System, Inc. "should be scrutinized by the court with the greatest care," and *that*

any preference shown Phoenix Finance System, Inc., should be set aside.[6]

The answer prayed the court "to deny complainants the appointment of a receiver and to compel complainants to make a complete showing and accounting * * * of the method and manner in which bonds were sold and delivered, the consideration paid and received therefor; and to compel complainants to show in what manner the bonds authenticated by the Trustees were disposed of."[7]

In the amended answer (F. R. 68) the Bridge Company prayed that the Trustee Complainants make a full showing and accounting of its actions in connection with the trusteeship and "*that the court compel said complainants* [i. e. the Trustees] *to surrender to the clerk of this Court for cancellation any and all bonds improperly delivered* * * *."[8]

Following the filing of the answer the court appointed a receiver of the mortgaged property (F. R. 68-72). Thereafter one Fayette D. Kendrick, a Bridge Company stockholder, sought and was granted leave to file a petition of intervention (F. R. 73-85). This petition contained certain averments of fraud and prayed (1) that the intervener be permitted to intervene on behalf of himself and in be-

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[6] It is to be noted that the determination of such an issue (if in fact an issue) would have required the presence in the case of Phoenix Finance System, Inc., a Delaware corporation, as an indispensable party. As to such issue the Trustees had no interest. At this point the Receiver had not been appointed. Obviously, therefore, the required diversity of citizenship as to this alleged issue could not have existed.

[7] Note that the Trustees had no connection with or knowledge of the sale or delivery of the bonds by the Bridge Company to the Bondholders. (F. R. 536, 537.) The bonds were unregistered.

[8] Here again it will be apparent that if the answer be construed as tendering an issue with respect to the cancellation of the debt, Phoenix Finance Corporation and other bondholders whose bonds were attacked would have been indispensable parties (Clemons v. Elder, 9 Iowa 272). As to such issue there could be no Federal jurisdiction because Phoenix as such bondholder and the Bridge Company were corporations of the same state necessarily arrayed on opposite sides of the controversy.

half of all others similarly situated; (2) that the complainants' bill be dismissed; (3) that certain corporations (*not Phoenix Finance Corporation*) be ordered and directed to deliver to the office of the clerk of the court for cancellation bonds issued under the mortgage deed of trust and *that said bonds be cancelled;*[9] (4) that the deed of trust be held for naught and set aside; and (5) for general relief.

Following the filing of the intervention petition, a motion was made by the intervener (F. R. 83-84) that certain corporations (including Phoenix Finance System, Inc., but not the petitioner, Phoenix Finance Corporation) be made "parties defendant herein".[10] The first reference in the proceedings to Phoenix Finance Corporation is contained in an order of a District Judge[11] granting the petition for intervention (F. R. 85-86) which is in part as follows:

> "• • • and complainants' counsel having stated in open court that the Phoenix Finance Corporation has succeeded the Phoenix Finance System, Inc., and is the owner of the bonds involved in this action with the exception of about $10,000 worth of said bonds, it is hereby ordered and directed that the Phoenix Finance

[9] It seems obvious that the Master and the Court in the Foreclosure Cause gave the same effect to the intervention petition as though it had been a proper Cross-Bill in the right of the Bridge Company and against Phoenix Finance System, Inc., *for cancellation of bonds.* In fact the intervener in certain resistances filed in the Foreclosure Cause refers to his petition as a "Cross-Bill" and Phoenix' answer as an "answer to cross-bill" (F. R. 207, 393).

[10] It will thus be seen that the intervener sought to make Phoenix Finance System, Inc., a party defendant *to the cause stated by his petition,* viz., *a cause for cancellation of bonds.* As to such an issue Federal jurisdiction was lacking.

[11] In a supplemental opinion after final decree the District Judge who rendered the decree said (F. R. 208): "In the absence of the Judge of the District, Judge Molynaux of the District of Minnesota was holding the December, 1933, Term of Court at Dubuque, Iowa, and entered an order for the bringing in of Phoenix Finance Corporation as a co-plaintiff with the trustees. Whether the citizenship of Phoenix Finance Corporation was at the time given any thought does not appear." Obviously, therefore, the status of Phoenix, a Delaware corporation, as plaintiff in an action in which Bridge Company, a Delaware corporation, was defendant, was deemed a matter of sufficient concern to inspire this rather unique explanation.

> System, Inc., and the Phoenix Finance Corporation be made parties *plaintiff in this cause* and *defendant to the petition of intervention,* and the clerk of this court is hereby directed to issue the necessary processes and summons for said purpose." (Emphasis supplied.)

There were no pleadings of any character directed against or naming Phoenix Finance Corporation, this petitioner. Phoenix was brought into the case solely by virtue of the above mentioned *ex parte* statements of counsel for the Trustee Complainants.

The distinction between Phoenix Finance System, Inc., and Phoenix Finance Corporation, this petitioner, is not a captious or technical one. The intervention petition charges acts of fraud on the part of Phoenix Finance System, Inc., occurring in 1930 and early 1931. Phoenix Finance Corporation was not incorporated until December 29, 1931 (F. R. 542). The relationship between these corporations was simply that of vendor and vendee, respectively, of certain assets. As of January 1, 1932, Phoenix Finance System, Inc., made a sale of certain (but not all) of its assets to Phoenix Finance Corporation and received cash and securities as the consideration therefor. Phoenix Finance System, Inc., was sometime later dissolved and distributed its assets to its stockholders (F. R. 636, 673, 674, 691). *There was no merger, consolidation, corporate identity or succession.*[12]

The "Two-Stage" Theory of the Parties.[12a]

The Foreclosure Cause was tried before the Special Master on the theory that the sole issue for determination

[12] This question was decided in *Argenbright et al. v. Phoenix Finance Co. of Iowa,* 187 Atl. 124, 126 (Del. Ch.) and *Graeser v. Phoenix Finance Co. of Des Moines,* 254 N. W. 859 (Iowa).

[12a] A consideration of the facts under this heading and the next heading "The Non-Participation of Phoenix at the Trial" (p. 17) is not necessary if

at the first stage of the case was whether or not the mortgage deed of trust was a valid instrument and that if *any* of the bonds issued by the Bridge Company were valid, that a decree of foreclosure and sale should be entered, reserving for final determination in the second or subsequent stage, the question as to which of the bonds were entitled to participate in the proceeds of the sale of the mortgaged property. The understanding of the attorneys for the respective parties and of the Master as to these two distinct stages of the proceedings, is well established by the record [13] and is in conformity with established practice.

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the court shall agree with petitioner's primary position, *viz.*, that the status of Phoenix as a *formal* party and the absence of justiciable issues as to it in the Foreclosure Cause, rendered the Court incapable of adjudicating against it. The same result is reached if Phoenix were an "indispensible" party and the jurisdictional requirement of diversity of citizenship thus removed.

[13] In the complete transcript of the testimony taken by the Master at Des Moines July 15 to 20, 1935, of which a partial or narrative statement only is included in the printed record of the Foreclosure Cause (F. R. 531 *et seq.*), it will be found that at the beginning of the hearing, counsel for the intervener and the Bridge Company objected to testimony with respect to the bonds without their physical production and proof. Counsel for the Trustee complainants thereupon propounded the "two stage theory" and the evidence without the bonds being proven was admitted. With respect to other collateral issues, the Master by his rulings contemplated a later stage of the proceeding. At F. R. 551 he said: 'These side issues is something that must be tried out *at a later date.*" With respect to the producing of the books of Phoenix Finance System, Inc., to show the $35,000 as consideration for bonds, the Master said: "We will take that question up later." At F. R. 561, the Trustee complainants rested "reserving, if it is agreeable with the Master, the right to discuss with him the question of proving of these actual bonds that are outstanding, *which I think can be taken up at a later date.*" Counsel for the Bridge Company reserved the right to present testimony *later.* At F. R. 637, counsel for the intervener requested production of the bonds and the Master ruled that "it is immaterial *at this time.*" See also F. R. 451, where counsel for the Trustee complainants referred to the question with respect to the bond issue as being "subsequent" to the question of the validity of the mortgage.

At Mason City, July 22 to 24, 1935, further testimony of Intervener's witnesses was taken by the Master, a partial or narrative record of which appears in the printed record of the Foreclosure Cause (F. R. 653 *et seq.*). At F. R. 691, counsel for the intervener moved to dismiss "on the ground that the complainants have wholly failed to produce or account for the bonds in suit and therefore are not held to have established cause of action." The Master after "long discussion of counsel" (F. R. 692) gave specific instructions concerning briefs, but said (F. R. 693): "I think I have their theory, however, about it not being necessary to produce the bonds *at this time.*" The Master did not grant the application to dismiss and must therefore be assumed to have acquiesced in that theory of a later or second stage for proof of the bonds.

Defendant's Exhibit SC-106 in the instant case (R. 584) is a letter written by the attorney for the Trustee complainants to the Master on July 25, 1935, immediately following the Mason City hearing and in response to a request by the

The case never reached the second stage. The hearings before the Master, upon the basis of which he made findings of fact, related solely to that first procedural stage. Although the Master's report, filed March 10, 1936, recommended foreclosure, no provision was made for the bondholders to prove their obligations and the considerations therefor if contested. Phoenix duly excepted on this point (F. R. Suppl. 58, 3), but was denied relief (F. R. 203).

At the trial of the Supplemental and Ancillary Cause, Phoenix' counsel made the following tender of evidence (R. 277-278):

> "We further desire to offer testimony by Mr. Thompson to show that Phoenix Finance Corporation at no time in this case had an opportunity to offer evidence on its behalf, although it at all times was ready, willing and desirous of so doing. Your Honor held in this case that the trustees had exclusive control of the litigation. Mr. Rex Fowler was the attorney for the trustees. We propose to show through Mr. Thompson that he was told by Mr. Fowler that the time had not come for Phoenix to take any part in the proceedings, that the evidence offered against Phoenix

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Master (F. R. 693) that the complainants supplement their prior oral statement as to "their theory of the case." Mr. Fowler, as attorney for the Trustee complainants, wrote in part: "It is to be remembered at all times in the instant case that the validity of the mortgage deed of trust and the several bonds issued thereunder *is being asserted by the trustees under the mortgage deed of trust and not by Phoenix Finance Corporation.*" He then pointed out that, the litigation not being between the Bridge Company and Phoenix, the complainants had met the requirement of proof on its part as to the validity of the mortgage and bond issue.

For further proof of the definite understanding with respect to the "two-stage" theory, see affidavits of the various counsel involved (F. R. 224, 226, 228) and of certain of the witnesses present but released to return for the second stage of the proceeding (F. R. 258, 280, 355 and 368).

Arguments of counsel before the Master and before the District Court are not part of the *printed* record on appeal in the Foreclosure Cause. The *complete* Mason City and Des Moines transcripts are not given. *Complete* transcripts of all such arguments (with briefs in support thereof) and of such hearings are, however, included in the record below in the Foreclosure Cause and at the final hearing on the Supplemental and Ancillary Bill counsel for the Bridge Company asked the court to judicially notice the "transcripts of such evidence" and "all the records, papers and files" in the cause (R. 260).

by the interveners was premature and not necessary; that there had been a prima facie showing of consideration for the bonds, and that at that time it was not necessary for Phoenix Finance Corporation to rebut any of the evidence so offered.

We desire to prove through Mr. Thompson that Phoenix Finance Corporation had its witnesses physically present on one or more days at the hearing before the Master to testify, ready to testify on all of the issues which are now being asserted against it, and that Mr. Fowler, the attorney for the trustees, who had control of the litigation, stated it was not necessary at that stage of the proceeding."

The evidence thus tendered was rejected by the court (R. 287).

THE NON-PARTICIPATION OF PHOENIX AT THE TRIAL.

Phoenix did not participate in the trial of the Foreclosure Cause before the Master. It offered no evidence and no argument was made on its behalf by counsel at any hearing before the Master. The trustee complainants had "exclusive control" of the litigation, according to the District Court (F. R. 211). In connection with a petition for writ of certiorari to this Court in the Foreclosure Cause (No. 438, October Term, 1938) counsel for the Trustee complainants (Rex H. Fowler, Esq., and Charles S. Bradshaw, Esq.) filed certain "Suggestions" in part as follows:

"The Trustees presented the case in the District Court on the theory, believed to have been accepted by the Master in Chancery, that only one issue was then up for consideration, namely, the right to a foreclosure of the Mortgage Deed of Trust, and assumed that the question of the validity of the bonds would not be taken up until after a foreclosure was ordered (R. 224-230).

That is to say, the trustees never pretended to represent bondholders for any other purpose except that relating to the security under the mortgage.

At no time, did Counsel for the trustees attempt to prove the validity or disprove the invalidity of any individual bonds, as such. With the controversy between the mortgagor and the bondholders relating to the validity of individual bonds, the trustees felt they had nothing to do. Petitioner Phoenix Finance Corporation, the only bondholder in Court, was represented by its own Counsel (R. 91-92, 228-230).[14]

Counsel feel that if bondholders are to assume that they were represented in the courts below by us, they have reason to be dissatisfied with their representation."

W. B. Sloan, Esquire, counsel for Phoenix had entered his appearance in the case (F. R. 89). In an affidavit filed by Mr. Sloan in connection with a petition for modification of the Decree in the Foreclosure Cause, Mr. Sloan said (F. R. 228-230):

"• • • Bradshaw, Fowler, Proctor & Fairgrave of Des Moines, Iowa, were attorneys for Complainant Trustees in the case and had the view, as I understood it, that proper procedure was first to determine the validity of the Mortgage Deed of Trust and that at a later hearing the question would be considered of proving up the particular bonds entitled to participate in the foreclosure. They had made some study and investigation of that subject, and, as I understand the matter, had briefed it and since they appeared for the Trustees and had charge of the prosecution of the case I understood that aside from pleadings I would have no responsibility in connection with the depositions or tak-

[14] The reference is to record herein designated as the Foreclosure Record, or "F. R."

ing of testimony until the primary question about the validity of the Mortgage Deed of Trust was determined. Accordingly, I did not assume an active responsibility prior to the Master's report in the above case.

* * * * * *

"I know that there is available a large amount of evidence which was not introduced into the record in the above case which has, in my judgment as a lawyer, a very direct and material bearing on the validity of the bonds secured by the Mortgage Deed of Trust and which is substantial and vital in connection with the bonds held by Phoenix Finance Corporation, and I am thoroughly convinced that the case was not fully tried out on the questions which were actually decided and that there is a large amount of highly important and very material evidence which was never introduced in connection with the bonds of Phoenix Finance Corporation. It is my honest belief and best opinion based upon a large amount of this evidence in my possession that the case would be differently decided if such evidences could be introduced and that through inadvertence, oversight and misunderstanding the result reached in this case has been arrived at without the court getting the benefit of evidence which should be presented in order to do justice between the parties in the aforesaid case."

Although Mr. Sloan's name appears at the opening of hearing before the Master (F. R. 531), he examined no witnesses on direct or cross-examination and made but one objection to evidence (F. R. 637) which in itself bears out the "two stage" contention outlined in Mr. Sloan's affidavit and shows that he was present only in the capacity of an observer at the first procedural stage.

The oral arguments before the Master took place at Sioux City, Iowa, on October 25, 1935 (F. R. 122). The

Master's report lists the attorneys participating (F. R. 122) and it will be noted that no counsel for Phoenix was present. The Report of the Master (F. R. 115 *et seq.*) shows that the only witnesses heard were those of Trustee Complainant, and the Intervener. This report supports the statement that Phoenix introduced no evidence.

Only the Intervener and the Trustees were represented at the taking of the numerous depositions. Phoenix was not represented and no depositions were taken in its behalf. A letter from the Master dated March 9, 1936 stating what his findings and conclusions would be was not sent or addressed to Phoenix or to its counsel.[15] Accordingly even though all the parties and the Master had indulged in an honest procedural mistake with respect to the necessity of any proof of the bonds at the first stage, Phoenix had no way of knowing and in fact did not know, until the Master's report was filed on March 10, 1936 (F. R. 138) that this report would contain purported findings directly affecting Phoenix' status as a creditor or debtor of the Bridge Company.

Obviously if Phoenix had been regarded and treated *as a party* in the hearings before the Master it could have asked for and availed itself of the opportunity to offer evidence before the report was filed. The record shows that Phoenix had witnesses at the last hearing before the Master ready to present such evidence but, in conformity with the "two-stage" understanding and because the second stage had not arrived, Mr. Fowler, counsel for the Trustee Complainants told the witnesses to go home and return for the second stage hearing (F. R. 258, 280, 355, 368).

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[15] This letter is part of *official* record below in the Foreclosure Cause but not designated to be printed.

Mr. Fowler, the attorney for the Trustee Complainants, did not at any time represent Phoenix Finance Corporation, Phoenix Finance System, Inc., or any other of the Phoenix Companies (F. R. 363), and at the hearing before the Master Mr. Fowler gave specific notice that he did not represent Phoenix (F. R. 669). The understanding as to the non-participation of Phoenix is further borne out by the ruling of the Master fixing time for briefs (F. R. 693). No time is fixed for a brief by Phoenix nor did Phoenix file a brief.

In the Supplemental and Ancillary proceeding the foregoing facts were called to the attention of the court by Phoenix' Answer and Counterclaim (R. 164, 165), in the resistance of Phoenix to the motion of Bridge Company that certain depositions be not taken (R. 240, 241) and in the statements of counsel for Phoenix at the final hearing (R. 277, 278).

The Findings and Decree.

The order of reference to the Special Master (F. R. 107) directed him "to hear all of the *issues* in said cause," "to examine the questions *in issue*," and "to report from said evidence his findings of fact and conclusions of law in respect to all of the *issues* * * * ." (Emphasis supplied.) [16]

The Master found certain of the bonds were validly issued and recommended foreclosure with respect thereto (F. R. 138). Had this recommendation been approved by the District Court the case would normally have proceeded

[16] Both the Master and the District Court in the Foreclosure cause obviously considered the *issues* to be broader than *mortgage foreclosure*. It appears that the petition for intervention was considered as tendering *an issue for cancellation of bonds*, to which the Bridge Company and Phoenix (both Delaware corporations) were the opposing indispensable parties. Even the intervener and his counsel treated the intervention petition as a "Cross-Bill." (F. R. 207, 393.)

to the second stage contemplated by the parties. However, the master made no recommendation with respect to the cancellation of bonds as prayed in the Intervention Petition (F. R. 137-138).

The District Court, partially reversing the Master as to certain bonds, found all bonds to be unenforceable *either by reason of their invalidity or because there were set-offs against the same,* with the exception of bonds of the face value of $15,000. This amount was held not properly to justify a decree of foreclosure. Accordingly foreclosure was denied.

The final decree of December 1, 1936 in the Foreclosure Cause and the scope and legal effect thereof is of principal importance on this writ of certiorari. The pertinent portions of said decree are as follows (F. R. 203-204):

> "That the mortgage bonds in suit were fraudulently issued. That all bonds were without valid consideration, with the exception of the bonds aggregating $15,000 only hereinafter specified. That the bill of the plaintiff be dismissed as to the plaintiff Phoenix Finance Corporation and that the prayers of the bill be denied, except in so far as the decree provides for the protection, of the holders of said $15,000 in bonds. *That foreclosure and sale of the mortgage property be denied.* * * *." (Emphasis supplied.)

No decree or judgment of any character was entered against Phoenix Finance Corporation with respect to any of the matters now in controversy.[17]

[17] Although both the District Court (F. R. 211) and the C. C. A. (F. R. 1691 *et seq.*) held that Phoenix was but "formal" and "unnecessary" party to the Foreclosure Cause, the costs thereof were assessed jointly against the Trustee Complainants and Phoenix (F. R. 204) (See former Equity Rule 40 providing that nominal parties are entitled to their costs and *Jackson v. Jackson*, 175 Fed. 711, 716 (C. C. A. 4th) to the effect that parties who are not indispensable should not be impleaded and if made parties should be dismissed). The collectibility of these costs against Phoenix or its surety is not here involved but is reserved for determination on an appropriate proceeding.

Upon a petition by Phoenix to modify, vacate and set aside the decree as to it,[18] the District Judge in a supplemental opinion said (F. R. 210-211) 19 Fed. Supp. at p. 141):

> "In such case I am of opinion *that the Trustees were the only indispensable parties plaintiff, had exclusive control of the litigation,* and that the only effect of bringing in Phoenix Finance Corporation was by admissions in testimony to establish the status of that corporation as the holder and owner of about 90% of the bond issue. That so far as jurisdictional considerations are concerned, *that corporation was merely a formal and not an indispensable party.*" (Emphasis supplied.)

The decree of the District Court in the Foreclosure Cause was affirmed on appeal to the Circuit Court of Appeals for the Eighth Circuit by decree of August 11, 1938 (F. R. 1709; opinion, 98 Fed. (2d) 416).

Phoenix' petition for modification (F. R. 216) was denied by the District Court (F. R. 411). One of the objects of that petition was to secure *affirmative relief* to enable Phoenix to litigate against the Bridge Company certain of the matters which are now in suit in Delaware and which were put in controversy by the Supplemental and Ancillary Bill. The Circuit Court affirmed that portion of the order of the District Court refusing such requested modification. The basis for this refusal and affirmance thereof is well stated in the concluding paragraph of the opinion of the Circuit Court (F. R. 1709; 98 Fed. (2d) at p. 429):

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[18] In the intervener's resistance to this motion, it was moved in the alternative (F. R. 207) that Phoenix' name be stricken from the record, or that the order making Phoenix a party be vacated, or that the decree of December 1, 1936 be re-entered with the name of Phoenix eliminated. Obviously intervener's counsel recognized the questionable validity of an *adjudication against Phoenix* in the Foreclosure Cause.

"Under these long established principles of equity and the pleadings and proof in this cause, the court did not err in refusing to modify the decree as requested by appellant by granting to complainants *affirmative* relief against the defendant." (Emphasis supplied.) [19]

The Nature and Status of the Causes of Action Pending in Delaware and Any References in the Findings and Conclusions of the Master and of the District Court in the Foreclosure Cause With Respect Thereto.

The causes of action hereinafter mentioned are partially set out in the Supplemental and Ancillary Bill. Complete exemplified records of said causes showing the status thereof on the date of final hearing in the District Court, are in evidence in this case as Defendant's Exhibit SC-101, SC-102, SC-103, SC-104 and SC-705 respectively (R. 385, 440, 482, 522 and 546).[20] In the following headings reference is made to the appropriate paragraphs of the Supplemental and Ancillary Bill with the record page thereof, the appropriate exhibit with the record page thereof, and the appropriate paragraphs of the decree of the District Court with respect thereto.

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[19] Phoenix does not question this ruling. It is recognized that in a cause of mortgage foreclosure, to which it was an involuntary "formal" party, in which no issues were framed involving the subject matter of its requested *affirmative* relief, and in which it had not participated as a party, Phoenix had no proper status to secure such relief. Recognizing the validity of this ruling Phoenix sued in the Delaware state courts which have unquestioned jurisdiction of the parties and subject matter.

[20] The Bridge Company also offered *incomplete* copies of these records (SC-1, R. 294; SC-2, R. 301; SC-3, R. 307; SC-4, R. 320; and SC-5, R. 340). Most important of the omissions in the Bridge Company's exhibits are the general appearances of its counsel and its pleas of *res adjudicata*, which raised the same question in the Delaware cases as here. In the one case tried the Delaware Court rejected the defense (14 Atl. 2d 386). Decision on writ of error pending decision in Supreme Court of Delaware. (Argued Jan. 30, 1941.)

THE $3125-$2000 NOTE CASE.[21]

7 (a) (R. 5); SC-101 (R. 385); a. (R. 720).

This is an action at law in the Superior Court of the State of Delaware for New Castle County by Phoenix Finance Corporation against Iowa-Wisconsin Bridge Company upon promissory notes of the latter *given directly to Phoenix Finance Corporation* (1) dated January 20, 1933, in the sum of $3,125 payable on July 20, 1933, and (2) dated December 15, 1932, for $2,000 payable on the 15th day of June, 1933.

To the plaintiff's declaration, the Bridge Company, after causing a general appearance of counsel to be entered, filed among other pleas the plea of *res adjudicata,* and at the trial and in proof thereof relied upon the record in the Foreclosure Cause. Certain other pleas and defenses filed by the Bridge Company (*including the plea of set off*) were abandoned at the trial. The case was tried before two Judges of the Supreme Court of Delaware, sitting in *nisi prius,* without a jury (by stipulation) and thereafter the matter was thoroughly briefed and argued by counsel for the respective parties. The trial was on June 15, 1939 (R. 439), or about three months before the filing of the Supplemental and Ancillary Bill (R. 745).

On March 18, 1940, the Judges of the Superior Court handed down a written opinion in the case which rejected the defendant's plea of *res adjudicata* and ordered the entry of judgment on behalf of Phoenix for the amount of said notes plus interest. The opinion appears in 14 Atl. (2d) 386. *The opinion of the Judges of the Delaware Su-*

[21] In the following analyses of the pending Delaware Cases and the status of the $50,000 mortgage and note, petitioner has set forth all findings in the Foreclosure Cause touching (even remotely) on the subject in issue. *It is emphasized that by so doing Phoenix does not concede that any of such findings are valid adjudications against it entitled to full faith and credit. This is the principal question on this writ of certiorari.*

perior Court in this case is applicable to all issues raised by the Supplemental and Ancillary Bill below. Writ of Error to the Supreme Court of Delaware was argued on January 30, 1941, and decision is pending. (See Clerk's Certificate in Appendix.)

It will appear that there is an irreconcilable conflict between the judgment of the Delaware Court and the Decrees of the District and Circuit Courts in the Supplemental and Ancillary Cause. Affirmance by the Supreme Court of Delaware will mean a like conflict between the Circuit Court of Appeals for the Eighth Circuit and the Supreme Court of Delaware. *By the decree of March 23, 1940, in the Supplemental and Ancillary cause Phoenix is commanded to dismiss this action with the other pending cases* (R. 722). *This necessarily requires Phoenix to satisfy this judgment at its own cost.*

With respect to the issues in this Delaware law action the following appear as findings of the Master in the Foreclosure Cause (F. R. 133, 134):

10 (i) "That the remaining bonds, approximating $19,000.00 or $20,000.00, were issued to the Phoenix Finance Corporation as security for a note of $3,125.00 given in part to secure the payment of that amount made by the said Phoenix corporation on behalf of the Bridge Company to pay taxes of the Bridge Company in the State of Wisconsin. That to the extent of the principal of, and interest on, the said note only the said bonds are valid, but to no other extent are these particular bonds valid."

10 (k) "That of the bonds above named issued to the Phoenix Finance Corporation to secure the said note of $3,125.00, the amount of bonds not necessary for such security, approximating the sum of

21a. $20,100 of bonds were issued by Bridge Company to Phoenix as collateral only to $17,735.19 of Bridge Company notes. $17,[illegible]5.19 made up of $3,125 and $2,000 notes in above suit and $12,110.19 and $500

> $16,975.00 are without consideration, obtained by fraud, and invalid."

The master recommended foreclosure as to $27,125 of bonds, including the $3125 item (F. R. 138). There was no finding of fact by the Master referring to the $2,000 note.

The District Court did not approve the Master's findings 10 (i) and (k) (F. R. 179). The Court, while not denying that said $3,125 note was in itself a valid and subsisting obligation of the Bridge Company to Phoenix, in effect *held and found that there was a set-off or counterclaim of the Bridge Company against Phoenix* in the sum of $14,000 which rendered this note unenforceable (F. R. 193). The reasons therefor are given in the opinion of the District Court in the Foreclosure Cause (F. R. 178). The District Court made no reference to the $2,000 note in its findings or opinion.

THE CHANCERY CASE TO SECURE RE-DELIVERY TO PHOENIX OF 517 SHARES OF BRIDGE COMPANY PREFERRED STOCK.
7 (b) (R. 6); SC-102 (R. 440); b. (R. 720).

This is a bill of complaint in the Court of Chancery of the State of Delaware, in and for New Castle County, wherein Phoenix is the complainant and the Bridge Company is the respondent. The bill alleges that on November 1, 1931, the Bridge Company issued to Phoenix Finance System, Inc., certificate for 517 shares of Class "A" stock fully paid and non-assessable; that on January 1, 1932, Phoenix Finance System, Inc., for a valuable consideration assigned said shares to Phoenix Finance Corporation; that on March 15, 1932, Phoenix Finance Corporation transferred and assigned said shares to the Bridge Company in exchange for the issuance and delivery to it of $60,390.14

principal amount of the Bridge Company's First Mortgage Bonds issued in pursuance of the mortgage deed of trust involved in the Foreclosure Cause.

The bill alleges that the form of this exchange of stock for bonds "was that of a purchase from your orator by said Iowa-Wisconsin Bridge Company of said 517 shares of its Class 'A' stock and the consideration for said purchase was the issuance and delivery unto your orator of the bonds of Iowa-Wisconsin Bridge Company as aforesaid"; and that upon the date the Bridge Company purchased the shares from Phoenix as aforesaid "there was an impairment of the capital of said respondent and by virtue of said attempted purchase and sale the capital of the respondent was further impaired." Accordingly, the bill charges that under Section 19 [22] of the Delaware Corporation Law the sale of said 517 shares of Class A Stock of the Bridge Company to the Bridge Company in consideration of the issuance and delivery by the Bridge Company to Phoenix of its bonds was invalid and void.

The bill further states that the Bridge Company refused to recognize said purchase and sale as having been a valid transaction and refused to recognize said bonds as valid and enforceable obligations; and that following said sale and purchase the Bridge Company did not cancel the stock but issued a new certificate to itself which it holds as treasury stock.[23] By the bill Phoenix makes tender of

[22] 2051 Sec. 19 of the Revised Code of Delaware, 1935, provides:

"Every corporation organized under this Chapter shall have the power to purchase, hold, sell and transfer shares of its own capital stock; provided that no such corporation shall use its funds or property for the purchase of its own shares of capital stock when such use would cause any impairment of the capital of the corporation; and provided further that shares of its own capital stock belonging to the corporation shall not be voted upon directly or indirectly; and provided, further, that nothing in this Section shall be construed as limiting the exercise of the rights given by Section 27 of this Chapter."

[23] This fact was also established in the Foreclosure Cause (R. 210, F. R. 976, 1269).

$60,390.14 principal amount of the said Bridge Company's First Mortgage Gold Bonds and demands the re-issuance to it of a certificate for 517 shares of Class A stock of the Bridge Company.

The Bridge Company appeared generally by its solicitors and filed an answer which is in effect a defense of *res adjudicata* based upon the record of the proceedings in the Foreclosure Cause. Phoenix thereupon moved for a decree notwithstanding the answer and the matter is pending hearing on this motion in the Court of Chancery. The existing injunction against Phoenix prevents it from moving the case to hearing.

There is nothing in the findings either of the Master or of the District Court in the Foreclosure Cause which denies the right of Phoenix to recover from the Bridge Company these 517 shares of the Class A Stock. In fact the Master found that, upon return of $60,500 of bonds to the Bridge Company, Phoenix should be permitted to receive the return of the 517 shares (F. R. 138).

The Master found that at the time of the exchange of the stock for the bonds there was an impairment of the capital of the Bridge Company in violation of the Delaware Corporation Law that the bonds were illegally issued both for this reason and also because the transaction violated a provision of the Bridge Company's corporate charter (F. R. 129). The District Court, by its approval of certain of the Master's findings (F. R. 179) and by its adoption of certain findings with slight modification of language (F. R. 180, 181, 200, 201) arrived at substantially the same conclusions. The District Judge found all bonds without consideration except $15,000 (F. R. 204). Accordingly, it was held that the 517 shares were no considera-

tion for $60,500 of bonds but there is no finding as to the right of Phoenix to a return of the 517 shares.

In Phoenix' petition for modification of the Foreclosure decree (F. R. 216) it was prayed *inter alia* that "the decree be so modified as to reinvest in petitioner 517 shares of 'A' stock surrendered in exchange for bonds" (F. R. 223). As above stated, this petition was denied by the District Court (F. R. 411). The Circuit Court of Appeals affirmed this ruling as heretofore stated (F. R. 1709; 98 Fed. 2d at p. 429).

Phoenix recognizes that its status in the Foreclosure Cause was such that the court did not have jurisdiction to grant this *affirmative* relief. Therefore it sued in the Delaware Chancery Court, the only court having jurisdiction both of the parties and subject matter. The exclusive jurisdiction of the Delaware Chancery Court in litigation of this character is hereinafter discussed.

THE $12,110.19-$500 NOTE CASE.

7 (c) (R. 66); SC-103 (R. 482); c. (R. 720).

This is an action at law in the Superior Court of the State of Delaware for New Castle County by Phoenix against the Bridge Company. It is based upon two promissory notes of the Bridge Company given directly to Phoenix, (1) dated July 7, 1933, in the sum of $12,110.19 payable on demand, and (2) dated December 31, 1932, in the sum of $500 payable on the 31st day of June, 1933. The Bridge Company appeared generally by its attorneys and filed certain pleas including the plea of *res adjudicata* based upon the record in the Foreclosure Cause. The case was at issue and ready for trial in the Superior Court at the time the temporary injunction against Phoenix was issued. From that time Phoenix has been prevented by

the order of the District Court below from bringing the case on for trial.

There is no finding or conclusion either of the Master or of the District Court in the Foreclosure Cause which is specifically and directly referable to the two notes for $12,110.19 and $500 respectively, for which Phoenix is suing the Bridge Company in Delaware in this action.

THE ACTION IN COVENANT ON THE INDEMNITY AGREEMENT. 7 (d) (R. 7); SC-104 (R. 522); d. (R. 721).

This is an action in covenant upon a sealed instrument by Phoenix against the Bridge Company in the Superior Court of Delaware for New Castle County. It is based upon a three party agreement (R. 540) dated November 10, 1930 wherein Phoenix Finance System, Inc., John W. Shaffer & Company and Iowa-Wisconsin Bridge Company are the parties.[24] By this agreement, the Bridge Company covenanted that in the event Shaffer & Company failed to pay and discharge its obligations and in the event Phoenix Finance System, Inc. was required to advance any sums of money by reason of any endorsement or guarantee in connection with the financing of the Black Hawk Bridge that it would pay to Phoenix Finance System, Inc. on demand a sum equal to the total amount due to first party (Phoenix Finance System, Inc.) from all causes in connection with said financing of said Bridge.

The declaration states that John W. Shaffer & Company failed to pay and discharge its obligations to materialmen; that Phoenix Finance System, Inc. thereupon and in pursuance of its obligations under the contract advanced to the Bridge Company for the express purpose of paying

[24] This contract appears as an exhibit in the Foreclosure Cause (F. R. 1393, *et seq.*).

said obligations sums aggregating $21,262.17; that said sums were used by the Bridge Company for the purpose of paying its obligations to the materialmen and that the Bridge Company thereupon became obligated to repay Phoenix Finance System, Inc. the sums so advanced. The declaration further alleges that on January 1, 1932 Phoenix Finance System, Inc. sold and assigned its interest in this contract to Phoenix Finance Corporation. Wherefore the plaintiff claims that the Bridge Company as the defendant in said action has breached the covenants of said agreement and that Phoenix as the plaintiff has been damaged thereby.

In this case also, the Bridge Company entered a general appearance and filed pleas including the plea of *res adjudicata* based upon the record in the Foreclosure Cause. The case was at issue awaiting trial when the injunction of the District Court prevented Phoenix from proceeding further.

While this cause of action is in covenant for damages for breach of the finance agreement of November 10, 1930 above referred to, it is nevertheless, with respect to the damages claimed, predicated upon two advances made by Phoenix Finance System, Inc. to the Bridge Company in cash and bonds of the United States in the sums of $10,000 and $11,262.71. These items are not identifiable in the Master's findings of fact in the Foreclosure Cause. However, in supplemental finding of fact 40 of the District Court in said cause (F. R. 201) appears the following:

> "That on March 7, 1932, a meeting of the board of directors of the Bridge Company was held at which were present Emory H. English, John A. Thompson, M. K. Thompson, Oscar R. Thorson, H. T. Wagner and A. B. Wilder, all Thompson and Phoenix Finance

System, Inc. controlled directors, at which a purported resolution was adopted for the delivery of $97,000 of Class A bonds of the Bridge Company to the Phoenix Finance System, Inc., for the purported $50,000 mortgage and interest thereon and for $10,000 to the Industrial Contracting Company, $9,000 to Kramer & Hogg and $11,262.71 to McClintic-Marshall Company, with interest on such items amounting to $83,811.29 and with discount on the bonds of $12,727.31, making a purported total of $96,538.58 and a purported balance of $461.42 being charged to Phoenix Finance System, Inc., on the books of the Bridge Company, making a total of $97,000.

The aforesaid $10,000 to the Industrial Contracting Company was neither due from nor paid by the Bridge Company as aforesaid and the Bridge Company did not owe the $11,262.71 to McClintic-Marshall Company. That said two items were items that had been fully covered and disposed of by the Bridge Company in its settlement with John W. Shaffer & Company and were items which Thompson & Company, subsidiary of Phoenix Finance System, Inc., had undertaken to pay. That as a part of the scheme, plan and conspiracy leading up to the issuance of said bonds here involved, the said Thompson paid the balance of $11,262.71 to McClintic-Marshall Company and as a form and pretense the said John A. Thompson, dominating and controlling the Bridge Company in its act, in making payment thereof for the Phoenix Finance System, Inc., as aforesaid, attempted to carry out such transaction as though he was making payment thereof for the Bridge Company and caused false entries to be made on the books of the Bridge Company as though said approximate amount had been advanced by the Phoenix Finance System, Inc., to the Bridge Company and the item paid by the Bridge Company, when in fact the Bridge Company did not owe said item."

The District Court also found that on August 6, 1931 Shaffer & Company owed Industrial Contracting Company $10,000 and McClintic-Marshall Company $11,262.71; that as of this date a settlement agreement was entered into between the parties by which the Bridge Company transferred to Shaffer & Company and its associates certain shares of stock; that Shaffer & Company turned over to Thompson of Thompson & Co. (a subsidiary of Phoenix Finance System, Inc.) 100 shares of those so received, and that Thompson & Co. thereupon agreed to pay the Industrial Contracting and McClintic-Marshall items (F. R. 194, 195). This may be construed as a finding that the Bridge Company was thereby relieved of its liability to pay these items.

At another point the District Judge found that Phoenix Finance System, Inc., paid Industrial Contracting Company $10,000 but that Thompson caused entries to be made in the books of the Bridge Company as though System had advanced the $10,000 to the Bridge Company (F. R. 196). Finally, the District Court held that all of the bonds were without valid consideration except $15,000 (F. R. 204). This holding, of course, applied to the bonds issued by the Bridge Company to Phoenix in settlement of or as security for these two items.

Neither of the items of $10,000 and $11,262.71 was attacked in any pleading. There was no claim that these funds were not received or used by the Bridge Company. There was no issue that Shaffer & Company and not the Bridge Company owed these bills and such issue could not have been adjudicated without Shaffer and Company being present as an indispensable party.

THE ACTION IN DEBT ON TWO $500 BONDS.
7 (e) (R. 7); SC-105 (R. 546); e. (R. 721).

This is an action at law in the Superior Court of the State of Delaware for New Castle County by Phoenix against the Bridge Company. The action is in debt and is based upon the obligations of the Bridge Company under two $500 first mortgage gold bonds Nos. 73 and 97 respectively. The declaration shows the breach by the Bridge Company of the terms and conditions of said writings obligatory and the plaintiff as the present owner and holder thereof (said bonds being negotiable and unregistered) claims the amount of said bonds ($1000) plus lawful interest.

The Bridge Company has appeared generally by its attorneys and filed pleas including the plea of *res adjudicata* raising the issue of the scope and effect of the record in the Foreclosure Cause. The case is at issue and awaiting trial when the injunction is lifted.

This cause of action is merely an action in debt on two $500 bonds. By paragraph 7 (e) of the answer and counterclaim of Phoenix (R. 150) it is admitted that said bonds were a part of the bonds originally issued to Helmer Anderson (not a party to foreclosure cause) by the Bridge Company in the total amount of $7,400. By stricken paragraph 13 of the Answer and Counterclaim of Phoenix (R. 151) it was alleged by Phoenix that Anderson sold all of said $7,400 of bonds for valuable considerations to various persons and that thereafter and prior to the decree in the Foreclosure Cause, Phoenix purchased the two bonds upon which this action is based, and it is the contention of Phoenix that its right to recover upon these bonds was or could not have been adjudicated by the decree of December 1, 1936, in the

Foreclosure Cause. The Master in the Foreclosure Cause by finding of fact 10 (b) (F. R. 132, 133) held as follows:

> "That of the remaining bonds $7,400 there were issued to Helmer Anderson for the consideration to the Bridge Company of $6,000, in consideration of the purchase of a leasehold and other interest in real estate belonging to the Bridge Company. So, to the extent only of said $6,000 did the Bridge Company receive consideration in this transaction."

This finding was approved by the District Court (F. R. 182). At no point in the record of the Foreclosure Cause does it appear that any of the then holders or owners of any of the so-called Helmer Anderson bonds were in any manner before the District Court in the Foreclosure Cause for the adjudication of their respective rights as innocent purchasers. It is to be observed that the $7,400 of bonds were given to Anderson in consideration for land purchased by Anderson's assignor from the Bridge Company for $6,000 plus gasoline station equipment and improvements added by Anderson after the acquisition of the land. Obviously, therefore, the District Court in this particular proceeded arbitrarily, without pleading, contention or issue, to approve the bonds to the extent of $6,000 and no more. Anderson was not in court actually or by representation. He had sold land and improvements to the Bridge Company for $7,400 and had received bonds in the face amount in payment. Later Phoenix acquired for value two $500 bonds of this issue (R. 207). There was no fraud alleged, proved or found with respect to this transaction.[25]

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[25] The foregoing recitals deal with 4 law and 1 equity actions in the Delaware Courts. The 5th law action referred to in the Supplemental and Ancillary Bill (R. 7, par. 7 (f)), the "Bridge Toll Ticket Case", was withdrawn from consideration at final hearing by counsel for the Bridge Company (R. 475). However, Bridge Company counsel designated this record to be printed (R. 737, par. 5) as a part of affidavit for preliminary injunction and the same is printed in this record (R. 107-118).

The $50,000 [26] Mortgage and Any References in the Findings and Conclusions of the Master and of the District Court in the Foreclosure Cause With Respect Thereto.

Paragraph 11 of the Supplemental and Ancillary Bill (R. 10) deals with a mortgage in the sum of $50,000 dated March 10, 1931, given by the Bridge Company to Phoenix Finance System, Inc., and recorded in Allamakee County, Iowa. Copies of this mortgage are in evidence in this cause as Complainant's Exhibits SC-6 and SC-7 (R. 374, 379) and it appears thereby that the mortgage is of record in Crawford County, Wisconsin, as well as Allamakee County, Iowa, in the name of Phoenix Finance System, Inc. It is admitted that the petitioner is the successor in interest of Phoenix Finance System, Inc., with respect to this mortgage and the note secured thereby. John A. Thompson if he had been permitted would have testified both on deposition and at final hearing (R. 208, 278) with respect to this mortgage. Such testimony was corroborated by that of Albert Penn, President of Phoenix Finance Corporation (R. 198, 290). The portion of the Answer and Counterclaim of Phoenix (R. 156) stricken by order of the District Court (R. 171) states the essential facts with respect thereto.

On March 10, 1931, Phoenix Finance System, Inc., loaned to the Bridge Company $35,000 in order to enable the latter to pay an indebtedness to the contractor in connection with the building of the Black Hawk Bridge. The indebtedness so paid constituted a lien upon the bridge property. At the same time Phoenix Finance System, Inc., loaned the Bridge Company the further sum of $15,000

[26] This is an "open mortgage" providing for further anticipated financing beyond the $50,000, and by reason of certain further advances, including $9,000 to pay certain liens, is now at least $59,000. It is not to be confused with the $200,000 mortgage deed of trust in suit in the Mortgage Foreclosure Cause.

which was placed to the credit of the Bridge Company with Thompson & Co., its then acting fiscal agent (F. R. 340). By July 13, 1931, this entire credit and all other credits in favor of the Bridge Company had been paid over to the latter by Thompson & Co. (R. 157; see also F. R. 1127).

The loans so made by Phoenix Finance System, Inc., were evidenced by a promissory note of the Bridge Company in the amount of $50,000 payable to the order of Phoenix Finance System, Inc., which said note was secured by a mortgage on all the property of the Bridge Company. This is the mortgage in controversy. The mortgage was authorized by the board of directors of the Bridge Company and ratified by its stockholders. It was executed and delivered as of March 10, 1931. Emphasis is placed upon the following provision of said mortgage (R. 376):

> "And the said Iowa-Wisconsin Bridge Company further agrees that the said Phoenix Finance System, Inc., at any time during the existence of this indebtedness, or any part thereof, and until the same is fully paid, shall have full power and is hereby authorized as attorney-in-fact for said Iowa-Wisconsin Bridge Company to pay all liens of any kind, whether prior or subsequent, that may in any manner affect the title to the lands, buildings, structures, toll bridge and appurtenances herein and hereby conveyed, and for the repayment of all moneys so paid, together with interest thereon at the rate of eight per cent per annum, payable semi-annually, this indenture shall be like security, in like manner, and with like effect as for the payment of said note."

On November 10, 1931, Phoenix Finance System, Inc., loaned to the Bridge Company the further sum of $9,000 in reliance upon the above clause of the mortgage. The

loan was made and used for the purpose of paying the Bridge Company's indebtedness to Kramer & Hog, a contractor, for grading work on the bridge project, which indebtedness constituted a lien on the bridge property for which the Bridge Company was liable (R. 158, 208). Both the Master and the District Court found that "the Bridge Company received full consideration for the said $9,000 thereof issued to Kramer & Hogg in settlement of a mechanics' lien claim." (F. R. 132, 182). It will thus be seen that the security of this mortgage is not limited to the original consideration of $50,000.

The items of $15,000 and $35,000 respectively which form the basic consideration for this mortgage are supported and verified by the report of the special examination of the receipts and disbursements of the Bridge Company as made by Ernst & Ernst, Auditors and Accountants, under date of January 17, 1940 (R. 595-693 at 611). This report is an exhibit to the resistance of Phoenix to the motions of the Bridge Company that certain depositions be not taken (R. 223), and at the final hearing was offered in evidence as Defendant's Exhibit SC-114 (R. 292, 595). The tendered testimony of Preuss (R. 217), Thompson (R. 205) and Penn (R. 197) verified the accuracy of said report. There is no contradictory evidence in either record. The $15,000 and $35,000 loan items are evidenced by a promissory note for $50,000 secured by the mortgage in question. At no point in the pleadings, evidence, findings, conclusions, opinions, orders or decrees in the Foreclosure Cause is to be found any reference to this $50,000 note. Neither the note nor a copy thereof was called for or introduced or even described in evidence in the Foreclosure Cause.

This note, by the decree in the cause below, is ordered delivered to the Clerk of the District Court for cancellation (R. 722), and pursuant to the stay order of April 8, 1940 (R. 725) has been delivered to the Clerk of the District Court to be impounded pending appellate proceedings. Until this was done, the Court had at no time or in any manner been advised by pleading or evidence as to any of the terms and conditions of the note, including interest or maturity.

With respect to the $50,000 mortgage, the consideration therefor as represented by the two loans of $15,000 and $35,000 respectively, and the subsequent item of $9,000 above referred to, the Master in the Foreclosure Cause held that there was no consideration except with respect to the $9,000 item (F. R. 132). The District Court by supplemental finding of fact 26 (F. R. 192) found that the Bridge Company received no consideration for the execution of said mortgage and "that the same was and is wholly without consideration, fraudulent and void." With respect to the advances totalling $50,000 and forming the consideration for said mortgage as originally issued, the District Court by the same finding found that "no part thereof was received by the Bridge Company."

The District Court did not disapprove of the Master's finding with respect to the validity of said $9,000 item. The Court took the same position with respect thereto as with respect to the $3,125 note above mentioned, viz., that the Bridge Company had a counterclaim or set-off against Phoenix in the sum of $14,000 which more than covered these two items. It is to be noted that no set-off or counterclaim is asserted by pleading. Even if this issue had been raised, it would have involved solely a controversy between

two Delaware corporations as opposing parties. It was in no way an ancillary issue in the Foreclosure Cause.

There was no pleading in the foreclosure case asking for surrender and cancellation of this $50,000 note or mortgage nor could such issues be heard even if pleaded without Phoenix being present as an indispensable party. With Phoenix present as such party, no Federal jurisdiction would have existed as hereinafter shown.

The Pleadings and Evidence to Support the Defense and Counterclaim That the Bridge Company Had Failed to "Do Equity," Was in Court With "Unclean Hands," and That There Was Fraud Inherent in the Decree of December 1, 1936, in the Foreclosure Cause.[26a]

As hereinafter shown, it is the primary contention of the petitioner that there was no valid adjudication in the Foreclosure Cause except the bare issue of foreclosure and that there were no valid adjudications against Phoenix with respect to any of the matters raised by the supplemental and ancillary bill.

It is an alternative contention of the petitioner (assuming *arguendo* the existence of such valid adjudications against Phoenix) that in a court of equity, where a party is seeking supplemental relief in aid of a decree in its favor, the Court should, on the basis of the equitable maxim that "he who seeks equity must do equity," and particularly where fraud and misrepresentation on the part of the prevailing party or its counsel is set up as a part of the defense to the ancillary relief, not only require the moving

[26a] A consideration of the facts under this heading is not necessary if the court shall agree with petitioner's primary contention, viz., that the decree of December 1, 1936, in the Foreclosure Cause contains no adjudication against it with respect to the issues of the Supplemental and Ancillary Bill.

party to show that the decree sought to be implemented was a "right" one, but should permit the defendant to the supplemental bill to show the lack of equity in the complainant and to prove the fraud alleged, and, if the charges are sustained, to refuse affirmative relief or to revise, modify or set aside its decree in the interest of justice. The facts so showing inequity and unclean hands on the part of the Bridge Company and the circumstances of fraud inherent in the decree of December 1, 1936, in the Foreclosure Cause are set forth in those portions of the answer and counterclaim of Phoenix stricken by order of the court below (R. 171, 151-167).

It would, perhaps, be sufficient to raise the point, for the petitioner to rely solely upon the District Court's action in striking the answer. The point is raised again, however, on the District Court's refusal to permit petitioner to take the depositions of Skoner, Preuss and Gage (R. 223) and of Thompson and Penn (R. 256).

The point is presented finally in the refusal of the District Court to permit the petitioner to offer testimony and exhibits at the final hearing (R. 286-292). Such evidence related not only to what were conceived to be relevant issues raised by the pleadings but also to lack of equity on the part of complainant and certain of the circumstances of fraud and misrepresentation as to the record which are inherent in the decree of December 1, 1936.

The facts so alleged and stricken and so offered and rejected may be summarized as follows:

(1) The petitioner contends that the Bridge Company may not maintain its Supplemental and Ancillary Bill because it has not done or offered to "do equity," and because it comes into Court with "unclean hands." Basically,

this is because the Bridge Company has not restored or offered to restore to Phoenix the *bona fide* considerations paid and advanced to it by Phoenix and its predecessor in interest. Proof of the supporting facts was offered by the depositions of Thompson (R. 205), Penn (R. 197), Skoner (R. 221), Preuss (R. 217), and Gage (R. 218), and the tendered testimony in person at the final hearing of Thompson (R. 276-286), Penn (R. 290), English (R. 291), and Skoner (R. 291). The principal item of proof of the outstanding indebtedness of the Bridge Company to Phoenix is, however, defendant's exhibit SC-114 (R. 595-693) supported by the offered testimony of the above named witnesses. This exhibit is a comprehensive report of a special examination of the financial affairs of the Bridge Company from November 1, 1930 (a date prior to first transaction involved therein) to September 25, 1933 (date of receivership), made by Ernst & Ernst, Accountants and Auditors, of Chicago.

It is shown by the offered testimony of Lee J. Skoner (R. 221-222), and of George E. Preuss (R. 218) that these witnesses:

> "examined the original cancelled checks representing all of the cash disbursements by check referred to in the report (excepting only checks for $1,994.37), examined all of the original bank statements or original records of the banks upon which such checks were drawn or in which the same were deposited and all of the cash deposits and withdrawals recorded on the books of the Bridge Company."

Accordingly this report is in no respects a "*petitio principii*", a characterization given by the District Court to another auditor's report presented in the Foreclosure Cause (F. R. 177).

The report shows that the Bridge Company received in cash from Phoenix (including Phoenix Finance Corporation and all predecessors in interest) $318,141.85 and repaid only $213,402.87, leaving an indebtedness of the Bridge Company to Phoenix of $104,738.98, which, less net credit for non-cash items of $6,389.52, leaves a balance of net cash justly due from the Bridge Company to Phoenix, exclusive of interest and exclusive of other stock and toll ticket investments or claims, of $98,349.46 (R. 598). On this indebtedness the report shows there had accrued as of December 31, 1939, legal interest in the *net* amount of $55,638.95. Accordingly, on the basis of said report and investigation so made, verified and certified, there is due to Phoenix from the Bridge Company a just debt totalling $153,988.41 (R. 603). *All of the claims in litigation in Delaware (excepting the Chancery case for the return of the 517 shares of "A" preferred stock and the Bridge Toll Ticket case) refer to parcels of this indebtedness. The underlying indebtedness of at least $59,000 for which the aforesaid mortgage is security is also parcel thereof.*

In proper courts in which it is an indispensable party and in which the Bridge Company has available and has, in fact, asserted all claimed defenses, Phoenix is attempting to recover this just indebtedness and thereby to have the day or days in court heretofore denied it.

(2) The litigation in the District Court in the Foreclosure Cause was in "exclusive control" of counsel for the complainant trustees (F. R. 211). Counsel and all parties throughout the proceedings acted under the belief and assumption that the only issues before the Master were the validity of the deed of trust, the existence of a default and the right to a foreclosure and, that any question as to

the validity of the bonds that might then be challenged, or, as to the consideration received by the Bridge Company therefor, was reserved for determination at a second stage of the proceeding. The facts justifying such belief and assumption are stated in the stricken 40th paragraph of the Answer and Counterclaim of Phoenix (R. 164) as follows:[27]

> "As to said matters, Phoenix has not had its day in court. Counsel for complainant Trustees in the foreclosure proceedings had complete charge of the litigation, as this Court found by its order of January 5, 1937. Said counsel acted throughout the proceedings under the belief that the only issues before the Master to whom said cause had been referred were the validity of the deed of trust, the existence of a default and the right to a foreclosure, and that any question as to the validity of the bonds or the consideration received by the Bridge Company therefor was reserved for determination at a second stage of the proceedings. This belief was founded in part upon the prevailing practice with respect to foreclosure proceedings in the United States courts and in part upon the apparent ruling of the Master that such would be the procedure before him. In the said proceedings before the Master and on exceptions to the Master's report and at other times in the proceedings, counsel for the Bridge Company repeatedly asserted and represented that the indebtedness of the Bridge Company to any bondholder was not in issue and could not be adjudicated in such foreclosure proceedings. Relying upon such representations and their belief as to the procedure to be followed, the Trustees offered substantially no evidence on their *prima facie* case on the foreclosure proceedings with respect to the consideration for any of the

[27] The facts as established by the record in the Foreclosure Cause have been heretofore further stated in a footnote under a former heading of this Statement p. 15, *supra*).

bonds, and the proofs offered in their behalf were merely the *prima facie* proofs in a foreclosure proceeding. Almost no cross-examination was attempted of the various witnesses called by the Bridge Company and the interveners in said cause and no evidence whatever was offered in rebuttal of the testimony of such witnesses, and counsel for the Trustees notified many prospective witnesses that their testimony would be required at a later stage of the proceedings."

At the final hearing in this cause, Phoenix offered to prove that at the hearing before the Master in the Foreclosure Cause it was at all times ready, willing and desirous of presenting evidence on its behalf; that it had witnesses physically present on one or more days; that counsel for the Trustee Complainants, who was in charge of the trial, stated that such presentation and evidence by Phoenix was not necessary at that stage of the proceeding; and that Phoenix accordingly dismissed its witnesses and offered no evidence on its behalf (R. 277, 278). See also F. R. 217-222, 224, 226, 230, 258, 280-282, 363, 368.

The above facts constitute the background upon and by means of which the claimed fraud was perpetrated.

(3) The District Court in the Foreclosure Cause denied a petition for modification of decree filed by Phoenix in an effort to correct the results of the procedural assumption above stated and to enable it to present its evidence with respect to the uncontemplated issues decided adversely to it and of which it was apprised for the first time by the Master's report. In this matter the District Court refused to exercise its discretion to reopen the case *on the ground that Phoenix had refused and failed to comply with an order of the court to produce its books and records.* In its opinion denying the motion for rehearing,

the District Court in the Mortgage Foreclosure Cause said (F. R. 413):

> "The interveners obtained an order of court for the production of the books and records of the Phoenix Finance Corporation before the Master, but Phoenix Finance Corporation vigorously and successfully it appears prevented the production of those books and records, and its officer when on the stand before the Master, declared his inability to produce, for they had been sent to the State of Florida. It is now with poor grace that the plaintiffs invoke the discretion of the court for a rehearing in order to use those very books and records. Anticipating an adverse ruling, the petitioners alternatively pray for a modification of the decree with provisions commanding the reissuing of certain shares of stock to Phoenix Finance Corporation, which it cancelled when fraudulently obtaining the bonds. One might conceive some invidious analogies to this situation. Having attempted the strong box of another and being hoist by what is now claimed to be a premature explosion, they volubly invoke the compassion of the Court to restore valuable implements of their craft left behind. I see no reason why a court of equity should be deeply concerned in giving an affirmative relief to the Phoenix Finance Corporation. On the other hand I think the petitions for rehearing should be denied and the motion to dismiss and vacate the decree overruled, and it will be so ordered."

The order of the District Court referred to in the foregoing quotation was dated April 24, 1934, the material portion thereof being as follows (F. R. 98):

> "Ordered that the defendant Phoenix Finance Corporation produce *at its office in Des Moines, Iowa,* all its books and records appertaining to the business and

affairs of the Iowa-Wisconsin Bridge Company, *within ten days from the date of this order* and submit them to the inspection of the Intervener and its counsel and accountant." (Emphasis supplied.)

That part of the application of the intervener requesting the production of Phoenix Finance System, Inc., and Thompson & Co. books (F. R. 92-96; 97-98) was not granted.

Paragraph 43 of the answer and counterclaim of Phoenix (R. 166) with respect to the foregoing states:

> *"The books were duly produced as required by said order and copies of the pertinent entries were furnished to counsel for the intervener and the ruling of the court on the petition for rehearing was solely the result of the deliberate misrepresentation to the court by counsel for the intervener in response to the petition for rehearing that Phoenix had defied the order of the court with respect to such books and papers."*

These facts are restated in the resistance of Phoenix filed to the motion of the Bridge Company that the depositions of Thompson and Penn be not taken (R. 248-250).

It has been shown that there was at least a misunderstanding between the Master and the attorneys for the respective parties as to the scope of the issues for the decision of the Master at that stage of the proceeding in the Foreclosure Cause. In addition thereto it is significant that even counsel for the interveners and the Bridge Company in the proceedings before the Master and on the exceptions to the Master's report repeatedly asserted and represented *that the indebtedness of the Bridge Company to any bondholder was not in issue and could not be adjudicated in such foreclosure proceedings."* (R. 165.) [28]

[28] See paragraph 40, Phoenix Answer and Counterclaim (R. 164). This was a provable allegation and in support thereof the defendant below, if it had been permitted, would have referred to the briefs and transcripts of record in

In view of these facts, it is inconceivable that the District Court upon the basis of the showing made on the petition for modification by Phoenix (F. R. 216, with supporting affidavits and exhibits 224 to 390) would not have granted the requested modification, at least to the extent of permitting Phoenix to offer its evidence and thereby have

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the court below in the Foreclosure Cause. All such briefs and transcripts are a part of the official record in the Foreclosure Cause as filed by the Master (F. R. 138). At the trial of the supplemental and ancillary cause, counsel for the Bridge Company asked the court to judicially notice all the records, papers and files in the cause (R. 260). The proof thus available is as follows: Counsel for interveners in brief filed with Master about August 26, 1935 at page 145 asserted that if any bondholder had a claim he might sue at law. At the Sioux City oral argument on October 25, 1935, counsel for the interveners said that if "good faith creditors" took bonds, that did not make them "good faith" bondholders but that "they still have their claim against the corporation," and that "if this bond issue is knocked out * * * they are in no worse position than they were before * * * they are just like the man who took a note for a debt." At the same hearing (p. 147 Sioux City transcript), counsel for the Bridge Company said:

> "Now then supposing that this court says that the bond issue is entirely void, either for fraud or if it is ultra vires, is the Phoenix Finance Company going to be hurt, the Phoenix Finance Corporation? They still have a remedy. If they have a legitimate claim they can still file that with the the Iowa-Wisconsin Bridge Company, and if the Iowa-Wisconsin Bridge Company is convinced that it is a fair claim they will be dealt with fairly. On the other hand if they are not convinced that it is fair the claim will be denied and they have their remedy in a court of law to try to enforce a general creditor's claim. They still have their right."

Again, this same counsel said (p. 150, Sioux City transcript):

> "But I believe that instead of throwing out only this one matter that this entire bond issue should go out, and any man or any corporation that has a legitimate claim against the Iowa-Wisconsin Bridge Company let him file it in due course and let him get what he is entitled to. I don't believe there is anything in the record of this corporation that shows that there was ever any intention of depriving one just creditor out of a dime. I don't believe any court would allow the Iowa-Wisconsin Bridge Company to defeat a man of a just claim."

At the same hearing, counsel for the intervener further stated (p. 87, Sioux City transcript):

> "* * * a matter that is tainted with fraud cannot stay in court, that the court will throw such a thing out of this court, it will relegate it to go back and to present its claims to a court of law, if it has any claims, and that is the situation here. If there is anybody there that is holding any bonds they can present them to a court of law and if they have legitimate claims they will be fairly dealt with."

Again, counsel for interveners in their brief filed with the District Judge on exceptions to the Master's report, used language identical in effect with the foregoing and restated (p. 20) "that if any bondholder has a legitimate claim, he may sue at law." At the Dubuque hearing on February 17, 1937, counsel also asserted that the $50,000 mortgage could not possibly be adjudicated in the Foreclosure Cause and that any right of Phoenix to the 517 shares of stock was a matter for the state courts to pass upon.

its day in court. It appears, however, with such moral certainty as is possible in such a case, that the discretion of the District Court was moved to deny the petition for modification of the decree and to reopen the case *solely* by reason of the false representations made by counsel for the interveners to the effect that Phoenix had refused to produce certain books and records as ordered. *There was nothing in the record to support this charge and, in fact, the charge is definitely disproved by the record itself.*

Thus on December 4, 1934, seven months *after* the order to produce, the intervener moved to strike the answer of Phoenix "on the ground that the said Phoenix Finance Corporation has wilfully disobeyed and refused to comply with the rules and order of this court for the production of books and papers * * *." (F. R. 106.) *The motion was overruled* and intervener excepted thereto (F. R. 108).

The statement that Phoenix had refused to obey the order for the production of its books was made so repeatedly by counsel for the intervener in briefs and oral arguments that finally the *mere statement* of the fact insinuated itself upon the court's mind *as a fact.* Not only were the required books and records of Phoenix produced *at its office in Des Moines* and kept available there *for more than the required ten days,* but copies of the required portions were supplied to counsel for interveners and officers and attorneys of Phoenix on many occasions told counsel for the intervener that the books were available for his use. He never availed himself of them.

The hearings before the Master were commenced in Des Moines, Iowa, on July 15, 1935 (F. R. 115) or nearly fifteen months after the order for production had expired by its term. There was no request or order for the production of books *at this hearing* or at the later reconvened hear-

ing in Mason City, Iowa. The order called for *only the records pertaining to the business of the Bridge Company* and it required those limited records to be produced at the Phoenix' Des Moines office only.

Phoenix did not, as heretofore shown, participate at said hearings but certain of its officers or former officers were examined orally and by deposition, one as witness on behalf of the Trustee Complainants, and the others on behalf of the Intervener. Although Emory H. English, a former Vice President of Phoenix, was present in person at certain of the hearings before the Master, he was not examined. Instead his deposition taken on November 27, 1934 (F. R. 613) was used. In this deposition, Mr. English stated that his entire activities were in the "loan offices" (F. R. 614) of certain loan corporations. Mr. English testified that the only account he had any connection with was the expense account in the Iowa-Des Moines National Bank (F. R. 614) and that the minute book and records of Phoenix Finance Corporation "bearing on the matter of succession of Phoenix Finance Corporation to the holding of the bonds" were (at that time, viz., November 27, 1934, or six months after said order expired) "all in the hands of the President and Secretary, not in my possession or under my control." (F. R. 615.)

John A. Thompson, President of Phoenix Finance Corporation, was called as a witness on behalf of interveners (F. R. 545) in July, 1935. He was interrogated at that time concerning books of *Phoenix Finance System, Inc.* and with respect thereto he said (F. R. 550):

> "I have no charge of the records of the Phoenix Finance System at this time. They are not in my custody or control."

The deposition of John A. Thompson (F. R. 414 *et seq.*) was also taken on behalf of the intervener but *it was never offered in evidence.* This deposition was taken *after* the required ten-day period. Mr. Thompson was interrogated about books of Phoenix Finance System, Inc. (not the books ordered), and with respect thereto, said (F. R. 470):

> "It would hardly be within my power or authority to produce the books of a corporation of which I am neither a stockholder or an officer or director. The proper channel for the production of that book is open to you and has always been open."

Mr. Thompson's deposition was taken between May 10, 1934 and August of the same year. The only Phoenix Finance Corporation record he was asked about was the minute book. He said that the minute book *at that time* (i. e., after the expiration of the order for production) was in St. Petersburg, Florida (F. R. 436) but, although not ordered to produce it at that time or at any time, Mr. Thompson voluntarily offered to have it sent from St. Petersburg to intervener's counsel "as quickly as the mails can bring it." (F. R. 476.) No further request for the book was made.

There is nothing in the depositions of Emory H. English or John A. Thompson or in the testimony of John A. Thompson nor is there anything elsewhere in the record which proves a violation of the order of April 24, 1934 to produce *at the office of Phoenix Finance Corporation in Des Moines within ten days thereafter* the books and records of that company "appertaining to the business and affairs" of the Bridge Company.

(4) The facts which Phoenix was in a position to prove at the anticipated second stage are fully stated in para-

graphs 17 to 38 inclusive of the Answer and Counterclaim of Phoenix (R. 153-164). All of these allegations were stricken by order of the District Court (R. 171). With respect thereto, it is stated in stricken paragraph 39 of the Answer and Counterclaim of Phoenix (R. 164):

> "To the extent that the findings of this court as entered December 1, 1936 and its decree are inconsistent with the foregoing allegation, the said findings and decree are contrary to the facts and are the result of the tactics of the interveners and their counsel in the trial of the foreclosure proceedings, first, in presenting to this court a voluminous record consisting largely of testimony and exhibits relating to immaterial and irrelevant issues, so ambiguous and disorderly as to make it difficult, if not impossible, for the court to ascertain the facts and to compel the court to rely upon the representations of counsel, and second, in making false representations or inadvertent representations, particularly with respect to the relationship between John A. Thompson and Shaffer prior to November 1, 1930, the status of the completion of the bridge project at November 1, 1930, the fact that the 3200 shares of stock and $10,000 paid to Shaffer & Co. under the superstructure contract did not cover or purport to cover extras under that contract nor pay for the completion of the bridge project, the fact that the Bridge Company was indebted to Shaffer & Co. on March 10, 1931 far in excess of $35,000 and the fact that the loans to the Bridge Company by Phoenix Finance System, Inc. in September and December, 1931, were for the purpose of enabling it to make payment to Industrial Contracting Company and McClintic-Marshall Company for extras under said superstructure contract for which the Bridge Company was liable under said contract. By reason thereof the said findings and decree are contrary to the facts in other respects, not herein specified."

The petitioner recognizes that as a general rule errors are reviewable only on appeal. However this is a *Supplemental Proceeding* and the party seeking *supplemental* relief is required to show that the former decree was a "right" one. The defendant can challenge that former decree as "wrong." As one part of its proof, petitioner, as the defendant in the *Supplemental Proceeding* below takes the position that the misrepresentations of counsel for the intervener as to what the record contained, made to the Master and to the District Court upon oral argument and upon briefs led the District Court into finding facts not only unsupported by the record, but in many instances definitely disproved by the record. The voluminous character of the record renders understandable how the court could thus be imposed upon.

A discussion as to what those facts are specifically and what detailed evidence is available to prove or disprove the same has no place on this writ of certorari.[29] *The point*

[29] As an outstanding example of a vital "wrong" finding of fact in the Foreclosure Cause sought to be challenged by the defendant in the Supplemental and Ancillary Cause is the following statement by the District Court in its opinion relating to findings of fact on the same subject (R. 169):

"Suffice to say that from that time on [Nov. 1, 1930] until shortly before the suit was commenced, J. A. Thompson and other officers of Phoenix Finance System, Inc. and other employees of that company controlled completely the Iowa-Wisconsin Bridge Company * * * ."

The finding of the Master on this point is substantially the same (F. R. 135).

Such fact does not appear from the Foreclosure Record and *such is not the fact.* Phoenix' evidence in support of its defense to the Supplemental and Ancillary Bill would have been in conformity with the allegations of its answer and cross-bill in this respect. Here is a fact underlying the decree of December 1, 1936 in the Foreclosure Cause which contributed materially to the result. It was not "right" and the petitioner as defendant to a supplemental bill seeking to implement a "wrong" decree was entitled to show the true facts. Briefly stated, the correct factual situation in this regard is as follows:

The only stockholders' meetings of the Bridge Company during the period in question were on Nov. 11, 1930, Nov. 26, 1930, March 10, 1931, Dec. 22, 1931, March 8, 1932 (F. R. 861 *et seq.*). At the time of the November, 1930 meetings, Phoenix Finance System, Inc. and all individuals identified with it in any way, including J. A. Thompson, owned only 3% of the total outstanding voting stock of the Bridge Company (F. R. 311) but not a single share of this stock holding was voted (F. R. 861, 880). At the March 10, 1931 meeting, 36.7%, the December 22, 1931 meeting, 18.5%, and the March 8, 1932 meeting, 22.6% was so owned (F. R. 311, 1299).

There were eleven members of the board of directors of the Bridge Company during the period in question. At no time during that period did more

is that under "Lord Redesdale's Rule," the defendant in the Supplemental and Ancillary Cause should have been permitted to show that the decree of December 1, 1936 was not "right."

Because the Bridge Company has not "done equity" and because fraud is charged as being inherent in the decree of December 1, 1936 in the Foreclosure Cause, the petitioner says that on this Supplemental and Ancillary Bill seeking to implement that decree, the District Court below should have scrutinized its records and modified that decree, or, at least, have permitted Phoenix to offer its evidence.

(5) At the final hearing on the Supplemental and Ancillary bill, Phoenix tendered evidence in connection with the foregoing. All such evidence was rejected (R. 286-292). At the final hearing, counsel for Phoenix in making tender of testimony and exhibits also made a comprehensive statement as to the exact nature and relevancy of the evidence offered. *In this respect, the attention of the court is directed to the statements of counsel, the colloquies between court and counsel and the rulings of the court below appearing at pages 272 to 292 of the record.*

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than four directors participating in any meeting have any connection whatsoever with Phoenix Finance Corporation or with Phoenix Finance System, Inc. During the critical period November 1, 1930 to November 1, 1931, never more than two of the directors participating in any meeting were identified with any Phoenix corporation. *At no time during the entire period* were there more than five out of eleven directors *entitled* to participate at meetings (if the same had been held) who had any identity with the Phoenix corporations. (F. R. 861 *et seq.*, 230-254, 257, 261, 262, 266, 269, 279, 280, 283, 287, 291, 299, 302, 312, 339, 342, 355, 365, 369, 375, 390, 391.)

The foregoing references (except F. R. 861 *et seq.*) relate to Phoenix' petition for modification of the decree and supporting affidavits and documents. In the Foreclosure Cause, Phoenix was denied the right to disprove this finding and to prove the facts. As above shown, this denial was predicated upon an entirely erroneous, unsupported and fraudulently induced conception by the court that Phoenix had wilfully disobeyed an order to produce books. Now on the supplemental and ancillary bill, Phoenix as the defendant is entitled to prove and establish *this fact* to support its contention that the decree of December 1, 1936 is not a "right" one. *At the trial of the Supplemental and Ancillary Cause Phoenix tendered proof of the above stated facts* (R. 282). Such tender was denied (R. 287).

The exhibits to be proved through John A. Thompson and offered in evidence in support of the tender (R. 287-290), the offered testimony of Albert Penn (R. 290) Emory H. English (R. 291) and Lee J. Skoner (R. 291) were rejected by the Curt. Theretofore the District Court had refused to permit the appellant to take the depositions of Thompson, Penn and Skoner (R. 256, 2[illegible]). The District Court refused to permit any of said witnesses to be sworn (R. 275-287; 291, 292). The witnesses Gage and Preuss were not available at the trial and not subject to subpœna (R. 272). The court had theretofore by order refused to the petitioner the right to take their depositions (R. 223).

SPECIFICATIONS OF ERROR.

1. That the Circuit Court of Appeals for the Eighth Circuit erred in holding that the decree of December 1, 1936, in the Foreclosure Cause constituted an adjudication against Phoenix Finance Corporation of the several issues and controversies in the Supplemental and Ancillary Cause.

2. That said court erred in holding that the Trustee under a deed of trust securing a bond issue, in a proceeding to foreclose the deed of trust, "represents" the bondholder so as to permit an adjudication of contractual obligations and claims (including unpleaded counterclaims and set-offs) between a bondholder and the defendant in the Foreclosure proceeding.

3. That said court erred in holding that in the Foreclosure Cause, the involuntary impleading of a bondholder, Phoenix Finance Corporation, a Delaware corporation, as party plaintiff (the defendant mortgagor being also a Delaware corporation) gave to such impleaded bondholder the

status of an indispensable party against whom a valid adjudication on unpleaded issues may be made, and that said court further erred in failing to recognize that the result of its holding in this respect is such as to divest the Federal court of jurisdiction because of the absence of diversity of citizenship.

4. That said court erred in failing to consider the exclusive jurisdiction of the Court of Chancery of Delaware with respect to the Delaware Chancery action (see p. 27 *supra;* p. 80 *infra*) and the issues thereof as being unrelated to and unidentified with any matters before the court in the Foreclosure Cause.

5. That said court erred in so construing said decree of December 1, 1936, in the Foreclosure Cause as to deny to Phoenix the right to enforce its several claims in the Delaware courts, where jurisdiction of the parties and subject matter existed, and in so doing, denied to Phoenix due process, in violation of Article V of the Amendments to the Constitution of the United States.

6. That said court erred in that the injunctions and mandatory orders against Phoenix involved in the decrees below, whereby Phoenix is restrained from further proceeding with the pending Delaware actions and is ordered to dismiss the same at its cost and to satisfy at its cost the judgment already obtained (in connection with which a writ of error to the Supreme Court of Delaware is pending), violated Section 265 of the Federal Judicial Code and general principles of Equity Jurisprudence (the defense of *res adjudicata* being available and asserted in the Delaware actions and being legally adequate).

7. That said court erred in holding that on the Supplemental and Ancillary Bill, the Bridge Company, complainant, was not required to show that the decree in the Foreclosure Cause was a "right" one and in holding that the defendant (the petitioner herein) was not entitled to show, in a proceeding *supplemental* as well as ancillary to the Foreclosure Cause, that such decree was the result of mutual mistake (on the procedural point) and fraud, and that the complainant in the Supplemental and Ancillary Bill had not done "one equity" and was in court with "unclean hands."

8. That said court erred in failing to hold that the decree of December 1, 1936, in the Foreclosure Cause is supplemented, enlarged and "pieced out" by this decree in the Supplemental and Ancillary Cause, and that, therefore, under the decisions of this Court, the equitable principle known as "Lord Redesdale's Rule" is applicable.

9. That said court erred in failing to hold that the District Court should have taken cognizance in the Supplemental and Ancillary Cause of the tendered proof of fraud inherent in its decree in the Foreclosure Cause.

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ARGUMENT.

Point I.

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Actions at law and in equity having been commenced by Phoenix in the courts of Delaware, involving certain issues claimed by the Bridge Company to have been adjudicated adversely as to Phoenix in the Foreclosure Cause, the Delaware courts have for determination under the defense of *res adjudicata* pleaded by the Bridge Company in each cause, the direct question of the scope and validity of the decree of December 1, 1936, in the Foreclosure Cause. In the one case tried and submitted on June 15, 1939 (R. 439) *prior* to the filing of the supplemental and ancillary bill below on September 18, 1939 (R. 3), the Superior Court of Delaware in a considered opinion written by two Supreme Court Justices sitting in *nisi prius*, rejected the defense of *res adjudicata* and held that the decree of December 1, 1936, with respect to any adjudication against Phoenix was not entitled to "full faith and credit."

Phoenix Finance Corporation v. Iowa-Wisconsin Bridge Co., 14 Atl. (2d) 386.

In that case, the Court said in part (pp. 388-389):

"It is a general principle often held in this State, and seemingly admitted by the present parties, that a judg-

ment rendered upon the merits by a court of competent jurisdiction upon a matter within its jurisdiction, is conclusive of the rights of the parties or their privies in other actions in the same or other tribunal of concurrent jurisdiction, as to any issue necessary to the first decision and actually litigated and determined in the former action. It is only the application of this principle which creates difficulty.

Now, of course, the very essence of res adjudicata requires that that tribunal whose judgment is sought to be made final should have had jurisdiction of the subject matter and of the parties sufficient to warrant its action."

The above case is pending decision on writ of error to the Supreme Court of Delaware (see Clerk's Certificate in Appendix).

The decision of the Delaware Superior Court is in accord with earlier Delaware cases.

Fryberger v. Consolidated Electric & Gas Co., et al., 7 Atl. (2d) 211;

Venetsanos v. Pappas, 184 Atl. 489 (Del. Ch. 1936;

Williams v. Daisey, 37 Del. (7 W. W. Harr.) 161, 180 Atl. 908;

Coca-Cola Company v. Pepsi Cola Company, 36 Del. (6 W. W. Harr.) 124, 172 Atl. 260.

The principles thus announced are in accord with the decisions of this Court.

Reynolds v. Stockton, 140 U. S. 254;

Southern Pacific R. Co. v. U. S., 168 U. S. 1;

Baltimore S. S. Co., et al. v. Phillips, 274 U. S. 316.

In the first cited case this court said:

(p. 265) "If the fact of a judgment rendered in a court of one State does not preclude inquiry in the courts of another, as to the jurisdiction of the court rendering the judgment over the person or the subject matter, it certainly also does not preclude inquiry as to whether the judgment so rendered was so far responsive to the issues tendered by the pleadings as to be a proper exercise of jurisdiction on the part of the court rendering it. • • •"

(p. 265) "The invalidity of the judgment depends upon the fact that it is in no manner responsive to the issues tendered by the pleadings. This idea underlies all litigation. Its emphatic language is, that a judgment, to be conclusive upon the parties to the litigation, must be responsive to the matters controverted. • • •"

Quoting from *Mundy v. Vail,* 34 N. J. Law 418, this court said (p. 268):

"The inquiry is, had the court jurisdiction to the extent claimed? Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case. *To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and third, the point decided must be, in substance and effect, within the issue.* • • •"

"And again: '*A judgment upon a matter outside of the issue must, of necessity, be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard.*'" (Emphasis supplied.)

The courts of the United States are upon the same footing so far as concerns the obligations created by their judgments, as the state courts.

Louisville etc. R. Co. v. Central Stock Yards Co.,
212 U. S. 132.

Point II.

The Decree of December 1, 1936 in the Foreclosure Cause as Supplemented by the Decree of Affirmance of the Circuit Court of Appeals and the Mandate Thereof Does Not Constitute an Adjudication Against Phoenix of the Several Issues and Controversies Involved in the Supplemental and Ancillary Proceedings Because . . .

(a) Phoenix Was Only a "Formal" Party to That Proceeding.

The District Court in the Foreclosure Cause held that "the trustees were the only indispensable parties plaintiff, had *exclusive control of the litigation,*" and that Phoenix "was merely *a formal and not an indispensable party*" (F. R. 211; 19 Fed. Sup. at p. 142). In the Circuit Court of Appeals, it was held (F. R. 1692; 98 Fed. (2d) at p. 420) that *"it is apparent that the Trustees are the only necessary and indispensable parties plaintiff."*

The Supreme Court of the United States has divided parties into three classes, viz., (1) formal, (2) necessary but not indispensable, and (3) indispensable.

Shields v. Barrow, 17 How. 130;
Williams v. Bankhead, 19 Wall. 563;
Waterman v. The Canal-Louisiana Bank etc. Co., Executor, 215 U. S. 33;
Minnesota v. Northern Securities Co., 184 U. S. 199.

The criterion by which to determine when one is a mere "formal" or "nominal" party is whether or not a decree is sought against it.

Payne v. Hook, 7 Wall. 425;
Union Bank of Louisiana v. Stafford, 12 How. 327;
Wormley v. Wormley, 8 Wheat. 421;
Niles-Bement-Pond Co. v. Iron Moulders Union etc., 254 U. S. 77;
Horn v. Lockhart, 17 Wall. 570.

No decree was sought or rendered against Phoenix in the Foreclosure Cause. The essential quality of the decree of December 1, 1936 in the Foreclosure Cause (F. R. 202-204) is contained in the following language (F. R. 204):

> *"That foreclosure and sale of the mortgaged property be denied* • • •."

Tested by these principles, Phoenix was truly and in fact but a "formal" party in the Foreclosure Cause, and as such was not such a party against whom the Court could validly adjudicate the enforceability of its notes, contracts and accounts receivable as against the Bridge Company, the enforceability of set-offs or counter-claims of the Bridge Company against Phoenix, the right of Phoenix to require the reissue of shares of Bridge Company stock, or the right of Phoenix to assert by legal process in a court of competent jurisdiction, its mortgages or the indebtedness secured by the same.

(b) Phoenix Was Not "Represented" by the Trustees to an Extent to Put in Issue (Even if Pleaded) the Underlying Obligations of the Bridge Company to Phoenix on Contracts, Notes and Open Accounts.

The Delaware Superior Court in the one case fully tried between the parties and involving, as the sole issue,

the defense of *res adjudicata* arising from the decree in the Foreclosure Cause said (*Phoenix Finance Corporation v. Iowa-Wisconsin Bridge Company*, 14 A. (2d) 386, 389):

> "We think that in a suit to foreclose a mortgage securing a bond issue the doctrine of representation of the bondholders by the Trustee means that *the Trustee represents all bondholders in all things relating to their common or individual interest in the trust of property, or in the bonds, but that such representation does not extend beyond a consideration of the trust property, or of the bonds secured thereby.* The Trustee cannot, by implication, be held to represent the bondholders beyond the terms of the instrument under which, alone, the Trustees have their origin or existence. The subject matter upon which the representation would apply must be one as to which both the Trustee and the person represented have an interest. In this case we are not directly concerned with the question as to whether the representation of a bondholder by a Trustee includes an inquiry as to the validity of the bonds themselves, or at what stage of the proceedings such inquiry should be had. No such question is here presented, for we are in no way interested in the bonds, as such.
>
> *The foregoing conclusion is not, we think, in any way inconsistent with Kerrison v. Stewart*, 3 Otto. 155, 93 U. S. 155, 23 L. Ed. 843; *Mercantile Trust Co. v. Schlafly*, 8 Cir., 299 F. 202; *Richter v. Jerome*, 12? U. S. 233, 8 S. Ct. 106, 31 L. Ed. 132; *Beals v. Illinois, etc., R. R. Co.*, 133 U. S. 290, 10 S. Ct. 314, 33 L. Ed. 608; or *Elwell v. Fosdick*, 134 U. S. 500, 10 S. Ct. 598, 33 L. Ed. 998." (Emphasis supplied.)

The foregoing succinctly states petitioner's contention. The decrees below are to a contrary effect.

The doctrine of representation is confined to the subject of the trust. The Trustees represent the bondholder

and in things "*relating to their common interest in the trust property.*"

Kerrison v. Stewart, supra;
Central Trust Co. v. California & N. R. Co., 110 Fed. 70.

The Trustee is a special, not a general, agent of the bondholders and is limited to the legitimate purposes of the relation he sustains to the security and the parties entitled to the benefit thereof.

Mackay v. Randolph Macon Coal Co. et al., 178 Fed. 881 (C. C. A. 8th);
Moran v. Hagerman, 64 Fed. 499 (C. C. A. 9th);
Harrisburg & Eastern R. Co.'s Appeal (Supr. Ct. Pa. 1888), 15 A. 459, 1 L. R. A. 230;
Iowa Title & Loan Co. v. Clark Bros. et al., 213 Iowa 875, 237 N. W. 336;
Fonda J. & G. R. Co. v. New York Trust Company, 233 App. Div. 443, 254 N. Y. S. 266;
Short on Railroad Bonds and Mortgages, Secs. 274, 497.

At the hearings in the Foreclosure Cause, counsel for the intervener [1] gave substantial corroboration to petitioner's position as herein stated. See transcript of hearings in the Foreclosure Cause, which Bridge Company counsel below requested be judicially noticed (R. 260; footnote 28, p. 48).

Petitioner's position is also well stated in the Eighth Circuit case of *Toucey v. New York Life Ins. Co.*, 102 Fed. (2d) 16 [2] as follows (p. 19):

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[1] Same counsel appearing for respondent herein.
[2] Certiorari granted January 6, 1941; No. 587; 61 S. Ct. 440.

> "The illustration of the rule is where it is made to appear in an equity suit brought to foreclose a mortgage or other lien that there is in fact no valid lien to enforce in equity. *In such cases the equity court may not proceed to adjudicate a claim of legal liability upon a promissory note or upon a purely legal obligation unrelated to equitable liens.* In such cases, the legal controversy presented is independent and distinct." (Emphasis supplied.)

In the Foreclosure Cause, the Trustees exercise a right to foreclosure conferred by Section 3 (c) of the Mortgage Deed of Trust (F. R. 37-38) as follows:

> "May, and upon the request of the holders of one-fourth in amount of (1) all the bonds outstanding hereunder, in respect of which such default in payment of principal and/or interest exists; or (2) all the bonds outstanding hereunder, in case of any other default, and in either case upon being first indemnified to its satisfaction, shall proceed to protect and enforce their rights and the rights of the bond holders under this Indenture by a suit or suits in equity, or at law, whether for the specific performance of any covenant or agreement contained herein, or in aid of the execution of any power herein granted, or for any foreclosure hereunder, or for the enforcement of any other appropriate, legal or equitable remedy, as the Trustees, being advised by counsel learned in the law, shall deem most effectual to protect and enforce the rights aforesaid."

The remedy chosen was equitable foreclosure. The "rights of the bondholders" under the Indenture involved merely the right, by foreclosure, to apply the security to the payment of the bonds. *To this extent only were the Trustees the agents of the bondholders.* No bondholder

directly or indirectly conferred upon the Trustees the right to litigate for them purely legal claims unrelated to the issue of mortgage foreclosure.

The doctrine of trustee representation is confined to the subject of the trust, or in other words, the property mortgaged and the equities of the bondholders therein. It does not extend to the indebtedness secured thereby. This principle is clearly stated in the case of *Central Trust Co. v. California & N. R. Co., supra*, as follows (p. 72, 110 of Fed.):

> "The principle that the trustee named in the mortgage given to secure the payment of bonds is the proper party to protect the interest of all the bondholders, and that individual bondholders will not be permitted to take part in the litigation, is not applicable to a controversy involving the validity of bonds for the satisfaction of which the foreclosure proceedings are being conducted."

See also:

Mackay v. Randolph Macon Coal Co., supra;
Moran v. Hagerman, supra;
Harrisburg & Eastern R. Co.'s Appeal, supra;
Fonda J. & G. R. Co. v. New York Trust Co., supra.

Analysis of Cases relied upon as supporting decrees below.

Kerrison v. Stewart, 3 Otto 155, involved an assignment in trust for the benefit of the creditors and the effect of an adjudication against the trustee to which the creditors were not a party. The Court recognized that the trustee does not always represent the beneficiaries in all matters pertaining to the trust, saying (pp. 160-161):

> "• • • The difficulty lies in ascertaining whether he [the trustee] occupies such a position not in determining its effect if he does. • • •

"Undoubtedly, cases may arise in which it would be proper to have before the court the beneficiaries themselves, or someone other than the trustee to represent their interests. * * *"

"It remains to determine whether Charles Kerrison was authorized to represent the creditors in proceedings against him to defeat the title he held for their security. This depends upon the intention of the parties, as expressed in the deed creating the trust and making him the trustee. * * *"

The Court then analyzed the instrument and found (p. 161):

"From this it appears that he was not only invested with the legal title to the property, but that all parties relied upon his judgment and discretion for the protection of their respective interests. A clear intent is manifested of relieving the creditors from the necessity of looking personally to the conversion of the securities or to the preservation of the trust. * * *"

The adjudication, of course, was confined to the trust res to which the trustee held title and did not affect the claims of the creditors, to which the trustee had no title.

In quoting from *Beals v. Ill. M. & T. R. Co.*, 133 U. S. 290, counsel for the Bridge Company has heretofore attempted to make it appear that the jurisdiction of the Court to declare the trust deed and the bonds invalid arose from the fact that the trustee under the mortgage was a party defendant and represented the bondholders. The fact is that the bondholders had all been made parties defendant and all known resident bondholders (p. 292) "were actually served with process, and all nonresident bondholders who could be named, together with all unknown bondholders, were duly served by publication;" and that (p. 293) "many

bondholders appeared and pleaded, putting in issue the allegations of the petition," so that there was class representation of the bondholders themselves in the proceedings. The case is not an authority for the proposition that bondholders need not be parties in a suit to invalidate their bonds.

Elwell v. Fosdick, 134 U. S. 500, was a suit to quiet title in which the trustee under a former mortgage was made a party defendant. Judgment was entered against the trustee and he released errors and waived the right of appeal. It was held that the release was binding upon the bondholders but it needs no argument to show that the holding affected only the security and not the indebtedness.

In *Richter v. Jerome,* 123 U. S. 233, the sole question was as to the security. The validity of the debt was not in issue and the Court found (at page 247):

> "Here the Trust Company began its suit for the foreclosure of its mortgage, and has sold under the decree in that suit all the interests, legal and equitable, which it held in the land as trustee for the bondholders, and distributed the proceeds, the complainant receiving his share without complaint and without objection. All the rights which the Trust Company, as trustee, had in the lands at the time of the mortgage passed to the purchaser at the sale. * * *."

In *Mercantile Trust Co. v. Schlafly,* 299 Fed. 202, the indebtedness was not in issue; the trustee in bankruptcy merely recovered a preference from the party to whom it had been made and who still held the money. The fact that he held it in trust was immaterial.

The Iowa Rule as to Trustee Representation Is Conclusive.

It has been heretofore pointed out that the Foreclosure Cause, by reason of the intervention of Kendrick, *took the*

form of a suit for cancellation of both mortgage and bonds. The intervention petition was regarded by intervener's counsel, the Master and Court as being in effect a *cross-bill for cancellation.* The final decree in the Foreclosure Cause purports to cancel both mortgage and bonds for fraud (F. '. 203-204). Assuming this issue to have been properly raised and to have been within the jurisdiction of the court to decide, who were the indispensable parties thereto?

In Iowa it is held that the holder of the indebtedness secured by a mortgage is a "necessary" party to a suit attacking the mortgage for invalidity of the indebtedness.

Clemons v. Elder, 9 Iowa 272.

In a suit in equity to invalidate a written instrument alleged to be fraudulent, the Iowa Court has held that all parties thereto must be before the Court.

Müler et al. v. Mahaffy et al., 45 Iowa 289.

In another case, the Supreme Court of Iowa recognized the fundamental distinction between the representative powers of the Trustee with respect to foreclosure of the security and the Trustee's powers with respect to the validity of the underlying indebtedness.

Iowa Title & Loan Company v. Clark Bros. et al., 213 Iowa 875; 237 N. W. 336.

These are rules of substantive law in Iowa and as such are controlling on the Federal courts.

Erie R. R. v. Tompkins, 304 U. S. 64;
Ruhlin v. New York Life Insurance Co., 304 U. S. 202.

The position of the Bridge Company, respondent herein, as stated in its Supplemental and Ancillary Bill below,

is that by the Foreclosure Decree "*all matters and differences*" between Phoenix and the Bridge Company "*were fully settled, adjudicated and determined*" (R. 3). The District Court used *identical* language in its findings on motion for preliminary injunction (R. 121, Four) and in its order for preliminary injunction (R. 133). The final decree (R. 719-722) gives effect to this basic error.

By this ruling below, Phoenix, a *formal party only* to the Foreclosure Cause, is restrained from suing Bridge Company on the underlying indebtedness and claims. This, it is submitted, extends the doctrine of representation to unprecedented bounds and applies to the principles of estoppel by judgment a concept which has the effect of depriving Phoenix of due process of law.

(c) THERE WERE NO ISSUES IN THE FORECLOSURE CAUSE INVOLVING PHOENIX AND NO ISSUES FRAMED IN THE CAUSE AS TO ANY PARTY JUSTIFYING AN ADJUDICATION AGAINST PHOENIX OF THE ISSUES RAISED BY THE SUPPLEMENTAL AND ANCILLARY BILL.

An adjudication to be valid (apart from the question of parties) must be within the issues as defined by the pleadings.

> *Reynolds et al. v. Stockton, Receiver, supra;*
> *Southern Pacific Ry. Co. v. U. S., supra;*
> *Baltimore Steamship Co. v. Phillips, supra.*

In *Reynolds et al. v. Stockton, Receiver, supra,* this court said (p. 268 of 140 U. S.):

> "• • • A judgment upon a matter outside the issue must, of necessity, be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard. • • •"

At another point, the Court said (p. 269):

> "* * * Thus, Lord Coke, treating of this doctrine says: 'A matter alleged that is neither traversable nor material shall not estop.' Co. Litt. 352b * * *."

In *Southern Pacific R. Co. v. U. S., supra,* the rule is stated as follows (p. 48 of 168 U. S.):

> "The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; * * *."

In *Baltimore Steamship Co. v. Phillips, supra,* the Supreme Court said (p. 602 of 274 U. S.):

> "* * * But if the second case be upon a different cause of action, the prior judgment or decree operates as an estoppel only as to matters actually in issue or points controverted, upon the determination of which the judgment or decree was rendered."

In *Bates v. Bodie,* 245 U. S. 520, this Court said (p. 526):

> "* * * And this court has established a test of the thing adjudged and the extent of its estoppel. It is: If the second action is upon the same claim or demand as that in which the judgment pleaded was rendered, the judgment is an absolute bar not only of what was decided but of what might have been decided. If the second action was upon a different claim or demand, then the judgment is an estoppel 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered (citing cases) * * *.'"

In the Eighth Circuit in the case of *Union Central Life Ins. Co. v. Drake,* 214 Fed. 536, the Court said (p. 545):

"* * * But there was no pleading of or prayer for a subrogation of the insurance company to the rights of the first mortgagee to his liens upon the three forties, *and evidence without pleading is as futile to sustain an adjudication of an issue as pleading without proof.*" (Emphasis supplied.)

The celebrated *Duchess of Kingston's Case,* 20 St. Tr. 361, is also an authority frequently cited. Therein the rule is stated:

"But neither the judgment of a court of concurrent or exclusive jurisdiction is evidence of any matter *which comes collaterally in question,* though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter *to be inferred* by argument from the judgment." (Emphasis supplied.)

The necessity of identity of issues for estoppel by judgment to apply is also well established by the following authorities:

Cromwell v. County of Sac, 94 U. S. 351;
Landon v. Clark, 221 Fed. 841;
Kicinko et al. v. Petruska et al., 259 Pa 1, 102 Atl. 286;
Lewis & Nelson's Appeal, 67 Pa. 153;
Yost v. Yost, 172 Md. 128; 190 Atl. 753;
Smith v. Rountree, 185 Ill. 219; 56 N. E. 1130;
2 Freeman on Judgments (5th ed.), Sec. 627, p. 1322;
1 Freeman on Judgments (5th ed.), Sec. 337, p. 674; Sec. 355, p. 738.

In the last cited text, the principle is stated in the following apt language (p. 738):

"* * * For courts cannot *ex mero motu* set themselves in motion, nor have they power to decide ques-

tions except such as are presented by the parties in their pleadings. • • •"

There is no ambiguity in the decree of December 1, 1936, in the Foreclosure Cause which justifies a reference to the opinion to determine the issue decided.

A comprehensive statement of this rule is found in *Bower on Res Judicata,* Section 173, as follows:

"For the purpose of ascertaining the subject-matter of the decision relied upon as a res judicata, only the record (in the formal sense) of the judgment itself, and such pleadings and other proceedings, if any, as tend to show what particular questions of law or issue of fact must necessarily have been determined by the tribunal in adjudicating as it did, can be examined. Where an express declaration as to any particular question or issue appears on the face of the record of the formal judgment, (a) or where 'from the judgment itself the actual grounds of the decision can be clearly ascertained,' there is no necessity for further search; but it is not permissible, where there is no such express declaration, to examine 'what was said by the judges,'—in delivering their oral judgments—'for the purpose of discovering what were the real grounds of their decision.' (b) The convenience, to say the least of it, of adopting such a practice is obvious, particularly in any case where the judicial tribunal consisted of two or more persons." • • •

The decree and not the opinion of the Court determines the scope of an adjudication.

Doyle v. Hamilton Fish Corp., 234 Fed. 47 (C. C. A. 2d);

J. J. Hockenjos Co. v. Lurie (Supr. Ct. N. J. 1934), 173 Atl. 913;

Mullaney v. Mullaney, 65 N. J. Eq. 384, 54 Atl. 1086.

In *The Drifter,* 35 F. (2d) 1006, the Court stated (p. 1007):

> "It is well settled that the decision or opinion of a court or the verdict of a jury does not make a matter res judicata. In order to secure that result, a judgment must be entered. Reed v. Proprietors of Locks, etc., on Merrimac River, 8 How. 274, 290, 291, 12 L. Ed. 1077; Smith v. McCool, 16 Wall. 560, 561, 21 L. Ed. 324; King v. Chase, 15 N. H. 14, 41 Am. Dec. 675; Lorillard v. Clyde, 99 N. Y. 196, 200, 1 N. E. 614; Springer v. Bien, 128 N. Y. 99, 102, 27 N. E. 1076."

See also:

D. L. Flack & Son, Inc. v. West Virginia Coal Co., 46 F. (2d) 177;

United States v. Davis et al., 3 F. Supp. 97;

Société Vinicole De Champagne v. Mumm Champagne & Importation Co., Inc., 10 F. Supp. 289.

There could have been no valid adjudication of a set-off or counterclaim in the Foreclosure Case without appropriate pleading.

As heretofore shown, the District Court in the Foreclosure Cause purported to disallow two admittedly bona fide items of indebtedness of the Bridge Company to Phoenix in the sums of $3,125 and $9,000 because of an alleged set-off or counterclaim of the Bridge Company against the same (F. R. 177-178; 19 Fed. Supp. at p. 140). There were no pleadings in the cause tendering such an issue.[8]

The proposition is well settled that "set-off" is an affirmative defense that must be affirmatively pleaded in

[8] In the $3,125-$2,000 note case in Delaware (now pending decision in Delaware Supreme Court), the Bridge Company *did* plead "set-off." (R. 421; 391; 427). *This defense was abandoned,* the sole issue at the trial being *res adjudciata* (14 Atl. (2d) at p. 386).

order that advantage may be taken thereof by the party asserting the same.

McGowan v. American Pressed Tan Bark Co., 121 U. S. 575;
United States v. Mitchell, 205 U. S. 161;
Stanley v. Turner, 68 Vt. 315, 35 A. 321 (Sup. Ct. of Vt., 1896);
Freeman v. Marsh, 3 N. J. L. 65;
Hildebrand v. American Fine Art Co., 109 Wis. 171, 85 N. W. 268;
State v. Board of Commissioners, 22 N. M. 562, 166 P. 906;
Wingate v. Parsons, 4 Del. Ch. 117.

Accordingly, even if valid adjudications had existed as to all other issues and the Court had had the necessary jurisdiction, the findings as to these two items must fall for want of sufficient pleading.

The Delaware Chancery Court has exclusive jurisdiction to determine the issues of the action to secure redelivery to Phoenix of 517 shares of Bridge Company preferred stock (*see Statement, pp. 27-30 supra*).

The facts have been stated heretofore showing that there was in fact and in law no issue in the Foreclosure Cause capable of adjudication on this point. Even if there had been, the District Court in the Foreclosure Cause lacked jurisdiction.

In the Delaware Chancery action, Phoenix is seeking to recover the stock *because there was an impairment of the Bridge Company's capital at the time of the transaction,* in violation of Sec. 19 of the General Corporation Law of

Delaware.[4] The transaction is also attacked because of the violation of the provisions of the Bridge Company's corporate charter.[5]

In the Delaware action, Phoenix has tendered the bonds received for the stock. The Bridge Company's defense is *res adjudicata* or estoppel by the decree in the Foreclosure Cause. Both corporations are domiciled in Delaware and, as to the issues in the Delaware Chancery case, no Federal Court has jurisdiction. The matter involved relates peculiarly to the internal affairs of a Delaware corporation.

2105 Sec. 75 of the Revised Code of Delaware, 1935 (Section 75 of the Corporation Law) provides:

> "For all purposes of title, action, attachment, garnishment and jurisdiction of all courts held in this State, but not for the purpose of taxation, the situs of the ownership of the capital stock of all corporations existing under the laws of this State, whether organized under this Chapter or otherwise, shall be regarded as in this State."

In *Rogers v. Guaranty Trust Co.*, 288 U. S. 123, this Court said (p. 130):

> "It has long been settled doctrine that a court—state or federal—sitting in one state will, as a general rule, decline to interfere with, or control by injunction or otherwise, the management of the internal affairs of a corporation organized under the laws of another State but will leave controversies as to such matters to the courts of the State of the domicile. • • •"

In the recent case of *Wojtczak v. American United Life Ins. Co.* (Mich. June, 1940), 292 N. W. 364, the Court

[4] See footnote, p. 28, *supra*.

[5] The Bridge Company charter is in evidence in the Foreclosure Cause. The appropriate clauses appear at F. R. 1640, 1645.

quoted from *Rogers v. Guaranty Trust Co., supra,* and reviewed the leading cases on the point. On the subject as to the character of the acts which relate to internal management, the Michigan Court quoted with approval from *North State Copper & Gold Mining Co. v. Field,* 64 Md. 151, 20 Atl. 1039, where that court said (at p. 1040):

> "* * * It may not be, in all cases, easy to draw a clear line of distinction between the acts of a corporation relating to its internal management, and those which do not. But we apprehend the distinction to be this: That, where the act complained of affects the complainant solely in his capacity as a member of the corporation, whether it be as stockholder, director, president, or other officer, and is the act of the corporation, whether acting in stockholders' meeting, or through its agents, the board of directors, then such action is the management of the internal affairs of the corporation, and, in case of a foreign corporation, our courts will not take jurisdiction. Where, however, the act of the foreign corporation complained of affects the complainant's individual rights only, then our courts will take jurisdiction, whenever the cause of action arises here."

In *Alm v. American Hair & Felt Co.,* 91 F. (2d) 354 (C. C. A. 7), a stockholders' suit had been filed to restrain the operation of a plan of a Delaware corporation involving the redemption of its common stock and its subsequent redistribution. The Circuit Court of Appeals affirmed the decree of the District Court declining jurisdiction, stating (at p. 358):

> "We are convinced that the controlling issue, and in fact the only issue, here presented must turn upon whether the acts complained of concerned only the management and internal affairs of appellee a foreign cor-

poration. That question must be answered in the affirmative."

See also:

Kansas, etc., Const. Co. v. Topeka, S. & W. R. Co., 135 Mass. 34;

Kimball v. St. Louis & S. F. R. Co., 157 Mass. 7;

Mau v. Montana Pacific Oil Co., 16 Del. Ch. 114, 141 A. 828;

In re Fryebury Water Co., 79 N. H. 123; 106 Atl. 225;

Jackson v. Hooper, 76 N. J. Eq. 592; 75 Atl. 568;

17 Fletcher's Cyclopedia on Private Corporations (1933), Sec. 8435, p. 396.

In *Black v. Zacharie*, 3 How. 483, this Court said:

"• • • From the nature of the stock of a corporation, which is created by and under the authority of a State, it is necessarily, like every other attribute of the corporation, to be governed by the local law of that State, and not by the local law of any foreign state. • • •"

In the Delaware Chancery action, Phoenix is complaining of an act affecting it solely in its capacity as a stockholder of Bridge Company. The act complained of is a transaction in violation of Delaware law and of the charter provisions of a Delaware corporation. The act was the act of the Bridge Company by its board of directors.

In the Foreclosure Cause the understanding of the parties and the Master respecting two distinct stages in the proceeding is in conformity with established Federal practice. In no event was the validity of bonds in issue at the first stage.

The position of the Trustee Complainants in the Foreclosure Cause, as to the "two-stage" theory of the case as

heretofore stated,[6] and the acquiescence of the Master therein, was correct as a matter of law and practice, and Phoenix was prevented by the Trustee Complainants from offering its evidence because of the reliance of the parties and the Master upon that practice.

The well established rule in foreclosure cases in the Federal Court is that the decree of foreclosure and sale is to be entered before the ownership and validity of individual bonds can be determined.

Dickerman v. Northern Trust Co., 176 U. S. 181;
Guaranty Trust & Safe Deposit Co. v. Green Cove, etc., R. R., 139 U. S. 137;
First National v. Shedd, 121 U. S. 74;
Union Trust v. Jones, 16 Fed. (2d) 236;
Fidelity Trust v. Washington, 217 Fed. 588;
Mercantile Trust Co. v. U. S. Ship Building Co., 130 Fed. 725;
Toler v. East Tennessee, etc., 67 Fed. 168;
Farmers Loan & Trust v. Toledo, 67 Fed. 49.

Upon the basis of the foregoing practice, it cannot be said that Phoenix was derelict in not offering proof of the consideration for and validity of its bonds at the first procedural stage.

Point III.

The Injunctions and Mandatory Orders Against Phoenix Below, Restraining It From Prosecuting the Pending Delaware Actions and Requiring It to Dismiss Said Actions Violates Principles of Equity Jurisdiction.

In each of the Delaware actions, Phoenix has appeared generally and has pleaded the defense of *res adjudicata* or

[6] See p. 14 and footnote 13, pp. 15-16, *supra*.

estoppel by reason of the decree of December 1, 1936, in the Foreclosure Cause. Such defense being available, the District Court below should have dismissed the Supplemental and Ancillary Bill.

High on Injunctions, (4th Ed.) Sec. 89, p. 100, succinctly states the rule:

> "The most frequent ground for refusing relief by injunction against a suit at law is that the defense urged may be used in the action at law itself, without resort to equity. And it may be laid down as a general rule that legal proceedings will not be enjoined on grounds of which the person aggrieved may avail himself in defense of the action at law. * * *"

The rule thus stated has the judicial sanction of the Supreme Court:

Creath's Admr. v. Sims, 5 How. 192;
Hendrickson v. Hinckley, 17 How. 443;
Marine Ins. Co. v. Hodgson, 7 Cranch. 332;
Phillips v. Negley, 117 U. S. 665;
Knox County v. Harshman, 133 U. S. 152;
Deweese v. Reinhard, 165 U. S. 386;
Truly v. Wanzer, 5 How. 141;
Scottish U. & N. Ins. Co. v. Bowland, 196 U. S. 611.

See also:

5 Pomeroy's Equity Jurisprudence (4th ed.), Sec. 2059, pp. 4650-4651.

In the case of *Smith v. Short,* 11 Ia. 523, the Supreme Court of Iowa said (p. 524):

> "* * * For aught that is shown, every matter stated in the bill can be made as fully available in answer and

defense, to the action at law, as by an appeal to equity. Under such circumstances, the parties should be left to their legal remedies and defenses."

Furthermore, Phoenix is entitled to a jury trial on the purely *legal* issues involved in the Delaware law actions. The Eighth Circuit Court in *New York Life Ins. Co. v. Stoner*, 92 Fed. (2d) 845, said (p. 849):

"* * * The granting of equitable relief would deprive defendant of the right to a jury trial, which should not be done without very substantial reasons therefor. * * *"

In the $3,125-$2,000 notes case, discussed in the Statement (p. 25), the defense of *res adjudicata* was not only available but was pleaded, litigated and decided (14 Atl. (2d) 386). Writ of error is pending decision in the Supreme Court of Delaware (see Clerk's Certificate in Appendix). If the Superior Court is affirmed, the Bridge Company has remedy by appeal to this court, in which event the Federal question should relate to the Full Faith and Credit Clause of the Constitution (Article IV, Sec. 1).

Point IV.

The Injunctions and Mandatory Orders Against Phoenix Below Violate Section 265 of the Judicial Code.

Section 265 of the Judicial Code (36 Stat. 1162; 28 U. S. C. A., Sec. 379) provides:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

A restraint against a party offends against the Section to the same extent as an injunction formally directed against the State Court itself.

Oklahoma Packing Company v. Oklahoma Gas & Electric Co., 309 U. S. 4.

Certain supposed exceptions to the rule are enumerated by the Eighth Circuit Court of Appeals in the case of *Equitable Life Assr. Society v. Wert*, 102 F. (2d) 10, 14. None of the exceptions therein stated are applicable to the facts here.

Even where the Federal Court has property in its possession, there are limits to the exercise of its power to enjoin. In *Guardian Trust Co. v. Kansas City Southern Railway Co.* (C. C. A. 8), 171 Fed. 43, 50, it was stated:

> "* * * the unquestioned rule that the pendency in a state or other court of an action *in personam* which involves no claim to or lien upon specific property in the possession or under the dominion of a national court of equity, and no issue of which that court has acquired exclusive jurisdiction, presents no ground for a dependent bill to stay it." (citing cases).

In the Chancery and law actions in Delaware, no relief is asked "affecting the control, possession or disposition of the res," now in the possession of the receiver of the District Court. No liens, claims or charges against the property are asserted. All the Delaware proceedings are *in personam* only.

It may be, as the Circuit Court said in *Equitable Life Assr. Society v. Wert, supra*, that a Federal equity court may "secure or preserve the fruits and advantages of a judgment or decree rendered therein." The sole question here is: To what "fruits or advantages" is the Bridge

Company entitled? What rights were secured and what burdens were imposed by the final decree of December 1, 1936, in the Foreclosure Cause? Could an action *in rem* to impose a specific lien on specific property bear fruits *in personam* beyond the issues and the parties indispensably in court? Did the Bridge Company litigate its indebtedness in a foreclosure suit in which its creditors were not indispensable parties? Did the "fruits and advantages" of the decree in that suit, brought to establish a specific lien on specific bridge properties, by trustees who "had exclusive control of the litigation," comprehend the stripping of Phoenix of its choses in action which were not a part of the *trust res*, and which the trustees did not hold, represent or control?

Point V.

A Construction of the Decree of December 1, 1936, as Denying to Phoenix the Right to Enforce Its Claims and to Litigate the Same in Courts Having Jurisdiction of the Parties and of the Subject Matter, Constitutes a Deprivation of the Property and Property Rights of Phoenix, in Violation of Article V of the Amendments to the Constitution of the United States.

The Fifth Amendment to the Constitution of the United States is in part as follows:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *"

The Judicial Department of the Federal Government is necessarily governed in the exercise of its functions by the rule of due process in the Fifth Amendment.

Hovey v. Elliott, 167 U. S. 409.

In judicial proceedings, due process of law must be a course of legal proceedings, according to those rules and forms which have been established for the protection of private rights. It must be one that is appropriate to the case and just to the parties affected. It must be pursued in the ordinary manner prescribed by the law. It must give to the parties to be affected an opportunity to be heard respecting the justice of the judgment sought. It must be one which hears before it condemns, proceeds upon inquir , and renders judgment only after trial.

Hurtado v. California, 110 U. S. 516;
Murray v. Hoboken Land &c. Co., 18 How. 272;
Burton v. Platter, 53 F. 901;
Thomas v. District of Columbia, 90 F. (2d) 424;
Albion-Idaho Land Co. v. Naf. Irr. Co., 97 F. (2d) 439, 444.

Judgments are conclusive only as to parties and their privies but even parties and privies are bound only so far as regards the subject-matter then involved.

1 Cooley's Constitutional Limitations (8th ed.), p. 112.

Thus if certain facts were not necessarily included in the issue, a party is not concluded by the judgment as to them.

Bates v. Bodie, supra;
Doonan v. Glynn, 28 W. Va. 715;
Lorillard v. Clyde, 99 N. Y. 196, 1 N. E. 614;
City of Rushville v. Rushville National Gas Co., 164 Ind. 162, 73 N. E. 87, 3 Ann. Cas. 86.

Point VI.

If the Decree of December 1, 1936 in the Foreclosure Cause Did Constitute an Adjudication of Such Issues Against Phoenix, Phoenix Must Necessarily Have Had the Status of "Indispensable" Party, and Those Issues Involving Legal Claims Between Phoenix, a Delaware Corporation, as Plaintiff, and the Bridge Company, a Delaware Corporation, as Defendant, the Federal Court Had No Jurisdiction Thereof.

Under this heading, it is assumed *arguendo,* as the Court below held, that there *was* a valid adjudication against Phoenix, a Delaware corporation, with respect to legal and equitable issues. With such issues we must regard Phoenix as the party plaintiff (or defendant to any counterclaim or set-off) and the Bridge Company, another Delaware corporation, as the party defendant (or plaintiff to any counterclaim or set-off). It is true that these things were not involved in the issue of mortgage foreclosure, but the Court below has said that these issues were decided. How does this affect Federal jurisdiction?

Phoenix must of necessity have been an "indispensable" party for there to have been an adjudication against it on any issue involved in the Supplemental and Ancillary Bill.

An "indispensable" party is one who not only has an interest in the controversy, but who has an interest of such a nature that a final decree cannot be made without affecting that interest.

> *Cunningham v. Macon & B. R. Co.,* 109 U. S. 446;
> *Shields v. Barrow, supra.*

Here we will assume, as the Court below held, that the decree in the Foreclosure Cause did, in fact, so "affect"

the interests of Phoenix as to constitute a comprehensive adjudication against it. The Court below, it is submitted, has thus arrived at a conclusion, the effect of which is to render void *for want of jurisdiction* any such purported adjudication against Phoenix.

The Constitution (Art. III, Sec. 2) limited Federal jurisdiction in the Foreclosure Cause to "controversies • • • between citizens of different states."

The joinder of defendants who are citizens of the same state as the complainants, will not oust Federal jurisdiction *where they are not indispensable parties.*

Weiland v. Pioneer Irr. Co., 238 Fed. 519; affd. 259 U. S. 498.

The joinder of a formal or nominal party in such case does not deprive the Federal Court of jurisdiction.

Wormley v. Wormley, 21 U. S. 421;
Carneal v. Banks, 23 U. S. 181;
Shields v. Barrow, supra.

As to the issue of mortgage foreclosure, there was undisputed Federal jurisdiction. The trustee complainants were respectively a corporation of Iowa and an individual resident of Wisconsin. The defendant, the Bridge Company, was a Delaware corporation.

If the intervention petition be construed as raising *an issue of cancellation of bonds*, then Phoenix, a bondholder, was an *indispensable* party to that issue. If any pleadings are to be construed as creating a justiciable issue as to the collectibility and enforceability of Phoenix' notes, contract and accounts receivable against Bridge Company or Bridge Company's set-offs or counterclaims against Phoenix, then also Phoenix was necessarily an *indispensable* party.

As to such assumed issues, Phoenix and Bridge Company (both Delaware corporations) were arrayed on opposite sides of the controversy. This is not a question of *ousting* Federal jurisdiction. That jurisdiction existed and remained *solely as to mortgage foreclosure. As to the other assumed issues, the jurisdiction never existed.*

The question here presented is, therefore, clearly distinguishable from that involved in *Supreme Tribe of Ben Hur v. Cauble,* 255 U. S. 356, where in a *class suit* it was held that the *voluntary* intervention as plaintiff of a citizen of the same state as the defendant did not oust Federal jurisdiction.

In *St. Paul Mercury Indemnity Co. v. Red Cab Co.,* 303 U. S. 283, this Court said (p. 288):

> "The intent of Congress drastically to restrict Federal jurisdiction in controversies between citizens of different states has always been rigorously enforced by the courts. * * *"

In *Chicago, B. & Q. Ry. Co. v. Willard,* 220 U. S. 413, the Supreme Court quoting from *Martin v. B. & O. R. R.,* 151 U. S. 673, 689, said (p. 420):

> "Diverse State citizenship of the parties * * * is absolutely essential, and cannot be waived, and the want of it will be error at any stage of the cause, even though assigned by the party at whose instance it was committed."

See also:

U. S. et al. v. Corrick, 298 U. S. 435, 440;
McNutt v. General Motors Acceptance Corp., 298 U. S. 178, 184;
M. C. & L. M. Ry. Co. v. Swan, 111 U. S. 379, 382;
Williams v. Nottawa, 104 U. S. 209.

The decision in the Foreclosure Cause (contrary to the decree in the Supplemental and Ancillary Cause) assumes that Phoenix was a "formal" and not an "indispensable" party to the suit. In this respect, that decision was in conflict with the decisions of the Supreme Court of Iowa *if we are to assume an issue as to cancellation the mortgage and bonds.* In a suit to cancel a mortgage, the Iowa Court has held that all beneficiaries interested in the mortgage debt must be made parties.

Clemons v. Elder, et al., supra.

The answer and intervention petition in the Foreclosure Cause demanded cancellation both of the mortgage and of the bonds. In a suit in equity to invalidate a written instrument alleged to be fraudulent, the Iowa decisions hold all parties to it must be before the court (i. e. *indispensable* parties).

Miller et al. v. Hahaffy et al., supra.

In *Erie Railroad Co. v. Tompkins, supra,* this Court said (p. 73 of 304 U. S.):

> "• • • the Federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the state, unwritten as well as written."

And in *Ruhlin v. New York Life Ins. Co., supra,* it was stated (p. 205 of 304 U. S.):

> "• • • The doctrine applies though the question • • • arises not in an action at law, but in a suit in equity."

In *Shields v. Barrow, supra,* this Court found absence of original jurisdiction after thirteen years of litigation in the lower Federal courts (p. 146 of 17 How.). There, as here, it was sought to invalidate a contract, one of the

parties to which was of the same state as the party raising the controversy. It was held that "a bill to rescind a contract presents an example" of indispensable parties (p. 139). The presence of each party to the contract is a prerequisite to equity jurisdiction. Equity could make no decree without them. And if, by joinder, one destroyed diversity of citizenship, it ousted jurisdiction of the Federal courts.

To the same effect is *Ribon v. R. R. Companies*, 16 Wall. 446, 450, holding that where "the interests of those present and those absent are inseparable, the obstacle is insuperable."

See also

Northern Indiana R. Co. v. Michigan Central R. Co., 15 How. 233, 245.

In *Minnesota v. Northern Securities Co.*, 184 U. S. 199, 246, 247, this Court said:

> "When it appears to a court of equity that a case, otherwise presenting ground for its action, cannot be dealt with because of the absence of essential parties, it is usual for the Court, while sustaining the objection, to grant leave to the complainant to amend by bringing in such parties. But when it likewise appears that necessary and indispensable parties are beyond the reach of the jurisdiction of the court, or that, when made parties, the jurisdiction of the court will thereby be defeated, for the court to grant leave to amend would be useless. Sec. 2 of Article 3 of the Constitution of the United States."

See also:

Gregory v. Stetson, 133 U. S. 579, 587;

Niles-Bement-Pond Co. v. Iron Moulders Union, 254 U. S. 77, 82;

Trimble v. Winston Co., 56 F. (2d) 150 (C. C. A. 5).

In *Swan Land & Cattle Co. v. Frank*, 148 U. S. 603, 610, this Court said:

> "Now, it is too clear to admit of discussion that the various corporations charged with the fraud * * * are necessary and indispensable parties to any suit to establish the alleged fraud * * *."

See also:

Gaylor v. Kelshaw, 68 U. S. (1 Wal.) 81, 82;
Nougue v. Clapp, 101 U. S. 551, 553;
Garzot v. De Rubio, 209 U. S. 283, 297;
Hill v. Wilson, 210 Fed. 200 (C. C. A. 5).

The Judicial Code, Section 37, as amended, imposes a duty upon the Federal Courts to dismiss any suit when it appears from the pleadings or the proofs "that such suit does not really and substantially involve a suit or controversy properly within the jurisdiction of said court," as defined by the Constitution and further limited by statute.

Jurisdiction cannot be waived and an appellate Federal court can and should consider the question on its own motion even if not raised.

Chicago, B. & Q. Ry. Co. v. Willard, 220 U. S. 413.

Point VII.[7]

By Reason of the Equitable Maxim: "He Who Seeks Equity Must Do Equity," and the Particular Application Thereof known as "Lord Redesdale's Rule," the Bridge Company by Its Bill of Complaint Supplemental and Ancillary to the Foreclosure Decree Was Required to Show That Such Decree Was a "Right" One and Phoenix by Its Answer and Counterclaim and by Evidence in Support Thereof Was Entitled to Show That Such Decree Should Not Be Implemented.

The Supplemental and Ancillary Bill seeks to enjoin, and the decrees below do in fact enjoin, Phoenix from asserting certain *bona fide* claims. These claims are all parcel of a general account between the parties shown with great certainty and clarity by defendant's rejected Exhibit S. C. 114 (R. 595-693). Those claims are further explained by paragraphs 17 to 38 of the Answer and Counterclaim of Phoenix (R. 153-164) stricken by the District Court (R. 171). By its Supplemental and Ancillary Bill, it is the Bridge Company that is now "seeking equity."

The general principle underlying the maxim has universal judicial recognition.

> *Thomas Tr. v. Brownville, &c. R. Co. et al.*, 109 U. S. 522;
>
> *Union Central Life Co. v. Drake*, 214 Fed. 536, 548 (C. C. A. 8th).

In *King et al. v. Hamilton et al.*, 4 Pet. 311, the Supreme Court said (p. 328):

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[7] Points VII, VIII and IX *infra* need not be considered if the Court agrees with petitioner's primary contention, viz., that the decree in the Foreclosure Cause did not validly adjudicate the issues of the Supplemental and Ancillary Bill adversely to Phoenix for the reasons, or any of them, heretofore stated.

"• • • When a party comes into a Court of Chancery seeking equity, he is bound to do justice, and not ask the Court to become the instrument of iniquity."

In the application of the maxim as a defense to the relief prayed, this case is governed by a rule, universally recognized and commonly referred to as "Lord Redesdale's Rule," in tribute to the statement of the rule by that famous Chancellor (author of Mitford's Chancery Pleadings) in *Hamilton v. Houghton*, 2 Bligh. 169, 193, 4 Eng. Rep. 290, 299, as follows:

"The party who comes into a court of equity to have the benefit of a former decree, must show that it was a *right* decree, if the decree appears to be erroneous, the Court cannot carry it into execution."

The rule is stated in even more emphatic form by Lord Chancellor Sugden in *O'Connell v. M'Namara*, 3 Dr. & War. 411.

This rule has the recognition of the Supreme Court.

Lawrence Mfg. Co. v. Janesville Cotton Mills, 138 U. S. 552;
O'Brien v. Wheelock, 184 U. S. 450;
Lewers & Cooke v. Atcherly, 222 U. S. 285.

It is submitted that on the Supplemental and Ancillary Bill, the Bridge Company was required to show that the decree in the Foreclosure Cause was a "right" one and Phoenix was entitled to show the contrary. Phoenix was also entitled to show circumstances of fraud and mutual mistake contributing to making that decree incapable of implementation. *In addition, Phoenix and its predecessors in interest had advanced large sums to the Bridge Company or for its benefit and the money so advanced remains un-*

paid. Under these same authorities, the Court below should have compelled the Bridge Company to do equity and to repay to Phoenix the sum by which it has been unjustly enriched. If this were not the law, we would have the absurd result that the rights of the Bridge Company upon the Supplemental Bill would be greater than they would have been upon an original bill or upon a cross-bill for affirmative relief in the original procedings.

Point VIII.

The Scope of the Decree in the Supplemental and Ancillary Proceeding Is Broader Than the Decree in the Foreclosure Cause and in Effect Substantially "Pieces Out" That Decree. The Case Is a Typical One for the Application of "Lord Redesdale's Rule."

The essential part of the final decree in the Foreclosure Cause is as follows (F. R. 204):

> "That the bill of the plaintiffs be dismissed as to the plaintiff, Phoenix Finance Corporation, and that the prayer of the bill be denied, except insofar as the decree provides for the protection of the holders of said $15,000.00 in bonds. *That foreclosure and sale of the mortgage property be denied* * * *."

The scope of the decree as appears from the above portions thereof is an exceedingly narrow one. It is not claimed by the Bridge Company that this decree was not carried into effect or in any way requires implementation. There has been no further attempt by the Trustee under the deed of trust to enforce the security.

Phoenix as a creditor of the Bridge Company on certain underlying indebtedness has brought suit in the courts of Delaware. These suits are in no way enjoined by the

decree in the Foreclosure Cause. It is accordingly urged that in filing the Supplemental and Ancillary Bill, the Bridge Company sought to enlarge and "piece out" the original decree far beyond its original scope. To do this, it must show that the decree is a "right" one under the principle of "Lord Redesdale's Rule."

The decree of March 23, 1940, in the Supplemental and Ancillary Cause enjoins and restrains Phoenix from prosecuting or carrying forward any and all of the actions of law and equity instituted by Phoenix against the Bridge Company in Delaware. The issues involved in the cases pending in the courts of Delaware, and the issue that would be involved if the $50,000 "open" mortgage were sought to be enforced are all *subsequent* to the foreclosure decree and are in no way treated therein. That decree merely denied foreclosure of the deed of trust and dismissed the bill.

For instance the mortgage dated March 10, 1931, executed by Iowa-Wisconsin Bridge Company and recorded in Allamakee County, Iowa and Crawford County, Wisconsin, was not in issue in the Foreclosure Cause, is not referred to in any decree in that cause, and was in fact not recorded in the two jurisdictions until June 2, 1939, in Allamakee County, Iowa, and May 18, 1939, in Crawford County, Wisconsin. The Supplemental and Ancillary Bill seeks, and the decree by mandatory order directs, Phoenix to satisfy this recorded mortgage and to deliver the note for $50,000 for which it is secured to the Court for cancellation. The note for $50,000 was not an exhibit in the Foreclosure Cause and there is no reference anywhere in the findings of fact of the Master or of the Court as to the existence of such a note. It is submitted that a decree which now directs Phoenix to satisfy a mortgage which was not involved in

the Foreclosure Cause and to deliver up for cancellation a note, the existence of which is unknown to the record of the Foreclosure Cause, is necessarily an enlargement and "piecing out" of the original decree.

Again, the petitioner urges that there was no issue in the Foreclosure Cause as to the right of Phoenix, as an involuntarily impleaded party plaintiff, to recover or have restored to it by the Bridge Company defendant the 517 shares of Bridge Company preferred stock which had been delivered to the Bridge Company in exchange for certain of the bonds secured by the deed of trust, the foreclosure of which was sought. *In the Delaware Chancery action, Phoenix is not seeking to recover these shares because the consideration for the exchange has been invalidated by the decree of December 1, 1936, but on entirely separate and distinct issues,* both of law and of fact. The mandatory order in this cause directing Phoenix to dismiss the Delaware Chancery action must of necessity be regarded as an enlargement of the scope of the decree in the Foreclosure Cause, not only because that decree does not deal with the subject, but also because the issues involved are entirely different.

It cannot be here said, as was stated by the court in the case of *Utah Power & Light Co. v. U. S.*, 42 F. (2d) 304, in *refusing* to apply Lord Redesdale's Rule as approved in *Lawrence Mfg. Co. v. Janesville Cotton Mills, supra,* that (p. 308):

> "But in the case at bar no modification of the former decree is sought. The plaintiff stands on the decree as it is and the case is not one in which a new trial of the former action can be had."

This case is rather one for the application of "Lord Redesdale's Rule" in supplemental proceedings to *enlarge* a de-

cree. In the case of *Gay v. Parpart*, 106 U. S. 679, the Supreme Court approved language of the Illinois Supreme Court in *Wadhams v. Gay*, 73 Ill. 415 as follows (p. 699):

> "We do not regard that it militates with the doctrine of the conclusive effect of what is *res judiccta* that where there is an incomplete decree and it is ineffective for want of the provision of any means for its execution, and an application is made to a court of equity to supply the imperfection so as to render the decree effective, then it is admissible to look at the real nature and character of the decree as it may appear in the light of surrounding circumstances for the purpose of determining whether there is such an equitable ground for action as will move a court of equity to interpose. Equity will penetrate beyond the covering of form and look at the substance of a transaction and treat it as it really and in essence is, however it may seem. * * *"

The very fact that the question before this Court has been raised by the filing of a *Supplemental* Bill [8] in the court below is indicative that the Bridge Company seeks an enlargement of an earlier decree. Such a bill presupposes some alteration in the interests of the parties arising by reason of "matter happening *after* the filing" of the original bill. It "is designed to supply some defect in the structure of the original bill."

> *Kennedy, et al. v. Bank of Georgia*, 8 How. 586, 610.

In a supplemental bill the subsequent matter alleged must be such as to vary the relief sought under the original bill. However, the decree of change in an earlier decree sought by the supplemental bill is not important to the application of "Lord Redesdale's Rule" so long as *some* additional relief is sought.

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[8] The bill below was "supplemental" as well as "ancillary."

In the case of *Lewers and Cooke v. Atcherly*, 222 U. S. 285, an earlier decree ordered the conveyance of property to appellant's predecessor in title. In the later proceedings, the appellant prayed in his bill that title to the property be registered and that the title be confirmed. While this relief was virtually the same as that originally sought by appellant's predecessor in title, the Supreme Court stated that under such circumstances the appellants were in "the same position as a party asking the aid of a Court of Chancery in executing a former decree, *and it is well established that he must take the risk of opening up such decree for re-examination.*" (Citing *Lawrence Mfg. Co. v. Janesville Cotton Mills, supra.*)

In the case of *American Radium Co. v. Hipp Didisheim*, 279 Fed. 601, the original decree failed to provide that its benefits should run to the successors or assigns of the original plaintiff. Ancillary proceedings were brought by one other than the original plaintiff to obtain the fruits of the earlier decree and also asking for an accounting. The Court applied the rule of *Lawrence Mfg. Co. v. Janesville Cotton Mills, supra*, and decided that the original decree was not *res adjudicata* and that the case must be considered on its merits.

In the case of *O'Brien v. Wheelock*, 184 U. S. 450, while the Court denied the relief sought in the ancillary and supplemental proceedings on the grounds of *laches*, it declared that it had the power to inquire into the former proceeding. The only material change in the supplemental proceedings was that landowners, some of whom had acquired land involved in the original proceedings many years after the original decree, were brought in as parties to the supplemental proceedings. In this case, the court

quoted from *Lawrence Mfg. v. Janesville Cotton Mills, supra*, as follows (p. 561):

> "But where a party returns to a Court of Chancery to obtain its aid in executing a former decree, it is at the risk of opening up such decree as respects the relief to be granted on the new bill."

It is submitted that the Court below has destroyed the equitable principle inherent in Lord Redesdale's Rule by refusing to apply it to a supplemental as well as ancillary bill which seeks additional relief based upon facts that had not occurred and were not even in contemplation at the time of the decree in the Foreclosure Cause.

Point IX.

The District Court in the Supplemental and Ancillary Proceeding Should, When Raised by Way of Defense, Have Taken Cognizance of the Tendered Proof of Fraud Inherent in Its Own Decree.

As a corollary to Lord Redesdale's Rule, it is held that a party may attack a judgment obtained by fraud in any subsequent proceeding thereon. The District Court, therefore, erred in rejecting the tendered proof of fraud inherent in its decree in the Foreclosure proceedings as a result of conduct on the part of the Bridge Company, the interveners, and their counsel.

Webster v. Reid, 11 How. 437.

There is a distinction between those cases where a party is seeking *affirmatively* to have a judgment or decree set aside on the ground of fraud and those cases (like the case *sub judice*) where a party is *defending* against a suit to enforce the alleged fraudulent judgment or decree.

Cases in the former category seem to hold generally that fraud to be available in an *affirmative* attack upon a decree must be extrinsic to the issues.

> *U. S. v. Throckmorton*, 98 U. S. 61;
> *Marshall v. Holmes*, 141 U. S. 589;
> *Atchison T. & S. F. Ry. Co. v. U. S., etc.* (C. C. A. 8) 106 F. (2d) 899.

In cases of the latter category, however, the *defending* party may offer any available evidence to show that the decree sought to be enforced is not a "right" one. This brings us back again to the application of "Lord Redesdale's Rule," discussed *supra*.[9]

Even if the rule of the *Throckmorton* case were controlling in the case of a party *defending* against the enforcement of an alleged fraudulent decree, nevertheless the evidence tendered in the court below comes within an *express exception* to the rule of that case. The Supreme Court in the *Throckmorton* case stated (pp. 65-66) that one of the "reasons for which a new suit may be sustained to set aside and annul the former judgment or decree and open the case for a new and fair hearing" is: *"where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent.* • • •" (emphasis supplied).

This exception is also emphasized in the case of *Chicago, R. I. & P. Ry. Co. v. Callicotte* (C. C. A. 8), 267 Fed. 799.

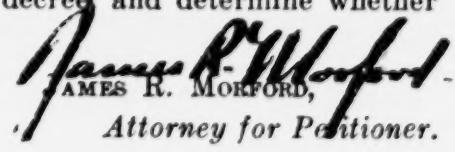
Particularly is the exception stated above applicable here. Phoenix, the unsuccessful party in the Foreclosure

[9] See also *Publicker v. Shallcross* (C. C. A. 3), 106 F. (2d) 949, wherein the Court stated as to the maxims *"interest rei publicae ut sit finis litium"* and *"memo debet bis vexari pro una et eadam causa"* (p. 952): "We believe truth is more important than the trouble it takes to get it."

Cause, was prevented from fully exhibiting its case by reason of three circumstances: (1) because of understanding, following approved Federal practice, with respect to the two-stage theory, by reason whereof Phoenix was prevented from offering its evidence, (2) because it was denied relief on petition for modification of the Foreclosure decree because of false representations of opposing counsel accepted by the Court with respect to its alleged failure to produce books as ordered, and (3) because of the circumstances of *extrinsic* fraud stated in stricken paragraph 44 of its Answer and Counterclaim (R. 166, 167).

CONCLUSION.

It is respectfully submitted (1) that the foreclosure decree did not and validly could not adjudicate, adversely to Phoenix, the several claims, demands and choses in action involved in the Supplemental and Ancillary Cause, or, in the alternative, (assuming, *arguendo,* such adjudication) (2) that, in the Supplemental Cause, Phoenix was entitled, by evidence in support of properly pleaded allegations of its answer, to have the court reopen the former case, scrutinize the Foreclosure decree and determine whether it was a "right" one.



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APPENDIX.

IN THE

SUPREME COURT OF THE STATE OF DELAWARE.

IOWA-WISCONSIN BRIDGE COMPANY, a Corporation of the State of Delaware, *Defendant Below, Plaintiff-in-Error,* v. PHOENIX FINANCE CORPORATION, a Corporation of the State of Delaware, *Defendant-in-Error. Plaintiff Below,*	Term A. D. 1940. No. 4 October

THIS IS TO CERTIFY that writ of error captioned as above was argued by counsel for the respective parties before the Judges of the Supreme Court of the State of Delaware on Thursday, the 30th day of January, 1941, that all briefs required by the Rules of the Supreme Court have been filed by the respective parties, that the Court has the case under advisement, and decision is pending.

(s) W. MARION STEVENSON,
Clerk of the Supreme Court.

February 6, 1941.

(Seal of the Supreme Court of Delaware)

IN THE

Supreme Court of the United States

October Term, 1940.

No. 624.

PHOENIX FINANCE CORPORATION, a Corporation of the State of Delaware,

Petitioner,

v.

IOWA-WISCONSIN BRIDGE COMPANY, a Corporation of the State of Delaware,

Respondent.

Reply Brief for Petitioner.

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IN THE

Supreme Court of the United States.

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PHOENIX FINANCE CORPORATION, A CORPORATION OF THE STATE OF DELAWARE,
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v.

IOWA-WISCONSIN BRIDGE COMPANY, A CORPORATION OF THE STATE OF DELAWARE,
Respondent.

REPLY BRIEF FOR PETITIONER.

REPLY TO RESPONDENT'S STATEMENT OF THE CASE.

Preliminary Statement.

The petitioner believes that the brief for respondent can be of but little assistance to the court in an appraisal of the true factual situation of the *two* causes below. A proper chronology of the several procedural steps is the first essential. Respondent's brief has confused facts, pleadings and rulings in the Foreclosure Cause with facts, pleadings and rulings in the Supplemental and Ancillary Cause in such a way that the court will find it difficult to understand the continuity and inter-relation of events and the exact status of the parties and issues.

Repeatedly throughout respondent's brief are statements analogous to that contained on page 3 where respondent says that petitioner's brief is "saturated with statements not supported by the record," and page 61 where the respondent charges petitioner with "deliberate misstatement." No useful purpose can be served in this reply by an extended criticism of such intemperate language. A careful review and analysis of respondent's brief, however, has failed to prove a single material inaccuracy contained in the petitioner's brief or a single point where a fact alleged is unsupported by the record references given.[1]

Actually there can be but little dispute as to the facts but these facts are so scattered through the records of the two cases and are of such volume and discontinuity that confusion may and does readily result from failure to scrutinize fully and carefully the numerous statements that certain facts are or are not "supported by the record."[2]

In the final analysis, the real dispute is not as to the facts but as to the legal conclusions to be drawn from the facts. In this respect, the respondent has confused law with fact, and throughout its brief has gratuitously challenged conclusions of law and charged misstatement with respect thereto. On the other hand, respondent's brief is replete with conclusions of the respondent where the *basic* facts are either not given at all or are incompletely or incorrectly stated.

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[1] On page 19 of petitioner's brief, reference is made to an objection of Mr. Sloan at the hearings before the Master and F. R. 637 is cited therefor. As respondent points out (brief, 37, 61), objections were also voiced or statements made by Mr. Sloan at F. R. 656, 659, 660, 661 (not 650-651 as stated, brief, 37). The point respondent misses, however, is that all of these references bear out the "two state" procedural understanding of the parties and do not bear out respondent's contention that Phoenix *defended on the merits.*

[2] Petitioner in the Foreclosure Cause made a strenuous effort to straighten out the record by motion to correct and expunge (F. R. 727-755). Except for inconsequential corrections the court overruled the motion (F. R. 755).

Then again, the respondent has misconceived and misunderstood the entire point of the "Foreword" to petitioner's brief and Point I of petitioner's argument. The decision in the Delaware case is not relied upon by petitioner *as a part of the record herein.* It is merely cited as a case in point just as other authorities of courts of competent jurisdiction are cited. Furthermore the decision is of peculiar and persuasive authority, because it relates to precisely the same parties, factual record and issues as the case before the Supreme Court. It relates to a part of this case to such an extent that the legal principles there involved are precisely the same principles primarily applicable to this entire case.

Furthermore, as a matter fortifying the discretionary jurisdiction of this Court in a writ of certiorari to the Circuit Court of Appeals, it was deemed advisable that the petitioner point out and emphasize the existing conflict between decisions of the Delaware Court and the Circuit Court of Appeals for the Eighth Circuit on the same subject.

Point I of petitioner's argument states the necessary premise for the consideration of the law of the case, viz., that the problem before the Supreme Court should be *tested* by the principles applicable to the construction of the "Full Faith and Credit Clause" of the Federal Constitution and the principles applicable to the defense of *res adjudicata* when raised in a second jurisdiction. In other words, it is quite apparent that one rule of law or set of principles should not be applied by the Federal Court in determining the effect and scope of its decree and another rule of law or set of principles applied by a state court of second jurisdiction where the same question is

presented by subsequent suit wherein the defense of *res adjudicata* is relied upon.

The question is: What rules of law or legal principles are applicable to both situations? The petitioner has cited and relies upon the Delaware decision (among other authorities) as giving substantial and persuasive support to its primary contention.

There are but the two following basic questions of law before the Supreme Court:

(1) *Was the decree in the Foreclosure Cause such an adjudication against Phoenix Finance Corporation as to the issues in the several Delaware cases as to be entitled to "full faith and credit"?*

(2) *Assuming such adjudication, was Phoenix Finance Corporation as the defendant in a Supplemental and Ancillary Bill to implement and enlarge that decree, entitled to challenge the same as "wrong" under "Lord Redesdale's Rule"?*

In the following (1) is referred to as Petitioner's "primary" contention and (2) as Petitioner's "alternative" or "secondary" contention. All other questions discussed in petitioner's brief relate to integral parts of, or off-shots from, these two fundamental questions. With respect to the alternative contention, *supra*, petitioner contends that it is entitled to challenge any purported finding of fact in the Foreclosure Cause which is not supported by competent evidence or is otherwise "wrong". Consequently, the petitioner with respect to the challenged findings in the Foreclosure Cause has stated what it earnestly and sincerely believes the facts to be and has given proper record references in support thereof. Furthermore the petitioner forti-

fied its *challenge* in this respect by tenders of evidence (R. 192-223, 238, 250, 272-292). All such tenders were rejected by the Court (R. 223-224, 256, 257, 287, 288, 289, 290).

The discourse of the respondent shows an utter failure on its part to appreciate just what the questions are, and its brief is such a confused and muddled presentation of the subject (both as to law and facts) as to constitute an ineffective answer to petitioner's brief and argument.

Inaccurate, Incomplete or Misleading Statements of Fact and Inferences in Respondent's Brief Tending to Misinform the Court and to Confuse the Issues.

The following discussions have reference to statements and inferences appearing on the indicated pages of respondent's "Statement of the Case":

(pp. 1, 2) The $3,125-$2,000 notes case was tried before the Delaware Superior Court on June 15, 1939 (R. 439) and submitted on briefs and argument. The Supplemental and Ancillary Bill below was filed in the District Court on September 18, 1939 (R. 2, 745). *Preliminary* injunction thereon was granted on October 7, 1939 (R. 132, 747), but the final decree was not granted until March 23, 1940 (R. 719) and the *permanent* injunction did not issue until March 25, 1940 (R. 756). The opinion of the Delaware Court in the $3,125-$2,000 notes case was rendered March 18, 1940 (14 Atl. (2d) 386).

(p. 4) The trial court below found as a matter of *law*, not as a matter of *fact* that the issues of the Delaware actions with respect to the $50,000 mortgage were involved in and adjudicated in the Foreclosure Cause. This confusion of the respondent as to what are matters of fact and what are matters of law, underlies its entire presentation of the

subject. *This point is the primary question of law before the Supreme Court.*

Furthermore, the principles stated in the cited case of *Alabama Power Co. v. Ickes*, 302 U. S. 464, and other cases cited on page 4 of respondent's brief are unquestioned. The point respondent has failed to grasp is that under petitioner's second or alternative contention above stated, a decree otherwise unassailable may be challenged as "wrong" upon an ancillary bill to implement and enlarge it. As this Court said in *Lawrence Mfg. Co. v. Janesville Cotton Mills*, 138 U. S. 552, at p. 561:

> "But where a party returns to a Court of Chancery to obtain its aid in executing a former decree, *it is at the risk of opening up such decree as respects the relief to be granted on the new bill.*" (emphasis supplied)

(pp. 4-13) Here the respondent has denominated a section of its brief as "Issues on Supplemental and Ancillary Bill". The only matter contained under this heading is the respondent's analysis of its own Supplemental and Ancillary Bill of Complaint below and its self-serving conclusions with respect thereto. Since that bill and the amendment thereto appear in full at pp. 3-100 of the Record and are concisely and accurately stated as to legal effect on pp. 4 and 6 of petitioner's brief, it is difficult to understand respondent's motive in thus unnecessarily enlarging upon the printed material the Court is called upon to consider. In any event, the respondent has wholly failed to state, and apparently does not comprehend, just what the *issue* is or what that term connotes.

The "*Issues* on Supplemental and Ancillary Bill" were essentially the two questions of *law* now before this Court

as above stated. With the striking of the major portion of petitioner's Answer and Counterclaim (R. 171-172), there remained practically no material issues of fact. The correctness of the ruling thus striking parts of the Answer and Counterclaim and in rejecting evidence to support the pleaded averments stricken are further issues of law for the consideration of this Court under petitioner's second or alternative contention *supra*.

(pp. 14-25) Here again, under the heading entitled "Answer and Proceedings Thereon," respondent has given its conception of what the petitioner's Answer and Counterclaim contained. This pleading appears in full at pp. 146-167 of the Record. The obvious purpose of the stricken portions of petitioner's Answer and Counterclaim was to challenge the Foreclosure Decree as "wrong" under "Lord Redesdale's Rule", thereby calling for the application of the doctrine of *Lawrence Mfg. Co. v. Janesville Cotton Mills, supra.*

Consequently when we find the respondent saying in a footnote on p. 19 of its brief that they "are met with the effrontery of Phoenix saying that all this ought to be disregarded as though Phoenix had not had a day in court although it conducted the entire proceedings.", we are led to the inevitable conclusion that the respondent does not realize that by filing the Supplemental and Ancillary Bill, it was *"at the risk of opening up"* the foreclosure decree "as respects the relief to be granted on the new bill."

(p. 16, footnote 3) Respondent says that "The question of consideration of the Helmer N. Anderson bonds was fully litigated and determined, * * *." Anderson was not made a party to the Foreclosure Cause in any classification and did not participate in the cause directly or indirectly. He is an

entire stranger to the record and there was no pleaded issue or prayer warranting the reduction of his $7400 of bonds to $6000 (See petitioner's Brief p. 36).

(p. 18, part of footnote 3) Respondent says that "On oral argument before the Master on the 25th day of October, 1935, it was stated *by counsel for the parties* that the entire case was submitted." As pointed in Petitioner's Brief (pp. 17-21) Phoenix did not participate at the trial or in the argument. Phoenix' counsel did not at any time so state (F. R. 691-695). At another point (p. 37) respondent also refers to the appointment of the special master by agreement of "counsel for the parties". Phoenix or Phoenix' counsel did not at any time so agree. Only the counsel for the Trustee Complainants and the intervener Kendrick so agreed (F. R. 107).

(p. 25) As in former briefs (in fact, the wording and record references are copied exactly from other briefs), the respondent makes the incomplete and misleading statement that the Foreclosure Cause "was instituted at the request and instigation of appellant, Phoenix Finance Corporation, and carried on at the expense of and under the direction of said Phoenix Finance Corporation by attorneys of its selection." No attempt has been made by the respondent to challenge, supplement or correct the statement of the *actual facts* in this respect as contained on pages 5 and 6 of petitioner's brief.

Furthermore, Exhibits B-2, F. R. 1479; B-4, F. R. 1480; B-6, F. R. 1481, are letters of Phoenix Finance Corporation. They relate to correspondence addressed to *Phoenix Finance Corporation.* They were written in 1933 and 1934, after Phoenix Finance System, Inc., a corporation, had sold out its every interest in the Bridge Company. The finance

business of Phoenix in its various branches, was known as the "Phoenix Finance System" under an appropriate trademark. This trademark no longer bore any relation to and obviously was not the tradename of the body corporate, "Phoenix Finance System, Inc." Accordingly, when counsel for plaintiff in error refers to "on stationery Phoenix Finance System, predecessor Phoenix Finance Corporation" (Brief, p. 25) it is felt that counsel, after previous notice of this same error, has indulged in more than accidental misstatement. Again, where counsel (Brief, pp. 25-26) refers to Mr. Thompson, President of Phoenix Finance Corporation, as president "of its predecessor", we find the record incorrectly stated. Mr. Thompson was not president of Phoenix Finance System, Inc., when those letters were written in 1933 and 1934. That corporation was dissolved August 1932 (F. R. 419). There is nothing in the record that it was anything more than a "predecessor in interest". As a corporate entity it was not a "predecessor" of Phoenix Finance Corporation in a legal sense (see petitioner's brief, p. 14).

(pp. 26, 27.) Respondent has here set out Section 10 of the Trust Indenture. Whatever may be the legal effect of this section and passing entirely the question as to whether in any event it evidences a power of attorney *granted by bondholders* to the trustees, the obvious and conclusive answer is that the *Foreclosure Cause was not instituted by the Trustees under the purported authority of that Section.* Foreclosure was sought under Section 3 (c) of the Indenture set forth on p. 70 of petitioner's brief which respondent has conveniently ignored. *The agency or extent of the representation of the Trustee Complainants must of necessity be determined by that section of the In-*

denture conferring the power sought to be exercised and not by some other section under which the Trustees have never purported to act.

(p. 30.) In the Foreclosure Cause, it is true that the Court *purported* to appoint Oscar R. Thorson, as receiver "of all and singular the property of the Iowa-Wisconsin Bridge Company, real, personal and mixed, of every kind, acquired by or belonging to said Defendant Company." While not deemed material to the case at bar, it is pointed out that the District Court for the Northern District of Iowa, under familiar principles, lacked jurisdiction to appoint a *general* receiver of a Delaware corporation, and its action in this respect is only effective to the extent of the prayer for a receiver of the property covered by the lien and within the jurisdiction of the Court (F. R. 11).

(p. 33.) The question as to whether the Trustee Complainants in a mortgage foreclosure cause, *represented* Phoenix Finance Corporation, a bondholder, to such an extent as to make possible an adjudication of legal choses in action personal to it, such as claims on notes, contracts and open accounts of Phoenix against the Bridge Company, and of set-offs or counterclaims with respect to alleged choses in action of the Bridge Company against Phoenix, is a principal question of *law* implicit in petitioner's primary contention. The respondent, however, at this point and elsewhere, treats the question as a matter of *fact*. Furthermore the *ex parte* statement of counsel for the Trustee Complainants, even though such counsel had been engaged at the "suggestion" of the bondholder requesting foreclosure (see petitioner's brief, p. 5) was ineffective, under any known principle of equity practice, to take the place of either pleading or proof.

On the same page in the reference to the answer of Phoenix Finance Corporation to the intervention petition, respondent has quoted incorrectly therefrom. The exact language from the record is that Phoenix asked "that its rights as holder of bonds *secured by said mortgage* be fully protected herein" (F. R. 92). The convenient omission of the italicized words effects a substantial change in meaning and effect.

(Pp. 34-35.) The Respondent has here referred to finding No. 41 of this Court in the Foreclosure Cause as conclusive. With respect thereto, it is stated (p. 35): "This finding * * * is *res adjudicata*, not subject to re-examination in this ancillary proceeding." *If such finding is not within the issues, is not supported by the record, or is not a fact, then it is "wrong" and "Lord Redesdale's Rule" as recognized by this court permits the re-examination thereof in the ancillary and supplemental proceedings.* It is this secondary matter of law in this case that respondent either does not understand or chooses to ignore. The matter of alleged interlocking *control* is separately treated and fully discussed under an appropriate heading, *infra.*

Again at page 35, respondent asserts that certain Bridge Company bonds were delivered to Phoenix Finance System, Inc. pursuant to a resolution of the Bridge Company board "while controlled by John A. Thompson, president of both Phoenix Finance System, Inc. and Phoenix Finance Corporation and his associates." *There is nothing in the record to support this unfounded and incorrect statement of fact.* In support thereof, the respondent cites F. R. 201-202. That was finding No. 40 of the Court in the Foreclosure Cause. F. R. 979 to 982 is similarly cited. This is the minute record of the meeting of the board of the Bridge Company of March 7, 1932. It shows merely what

directors were present. No *fact* record was cited, and no *fact* record exists which lends any measure of support to the above statement, directly or inferentially. On the same page, the respondent alleges "like control" with respect to the Bridge Company board resolution of July 8, 1933. There is no record evidence of such fact. For a full discussion of this question the court is referred to the separate heading on the subject, *infra.*

(p. 35) Respondent here refers to the issuance of $20,100 of Bridge Company bonds *"as collateral security for the payment of obligations originating with Phoenix Finance System, Inc. and to pay interest on fraudulent bonds and some other items found without consideration by the court on the original trial."* Such statement is misleading and untrue. These bonds were issued to Phoenix Finance Corporation *as collateral security only* for obligations originating solely with Phoenix Finance Corporation (F. R. 542). These obligations were evidenced by four promissory notes for $3,125, $2,000, (R. 419), $12,110.19 (R. 486) and $500 (R. 485) respectively, in all of which Phoenix Finance Corporation is payee. There is no pleading in the record attacking or describing these secondary obligations and in the Foreclosure Cause neither the Trustee Complainants nor Phoenix were purporting to assert or collect them, nor was the Bridge Company in any way called upon to defend against the claims thereof.

The record references given by respondent on this point do not establish the facts thus alleged. F. R. 1027-1029 are the minutes of Bridge Company directors' meetings of July 5 and 7, 1933. The July 7 minutes show that the $20,100 of bonds were authorized to be issued to Phoenix Finance Corporation "as collateral" to an authorized note for $12,110.19 "and other notes owing to the Phoenix

Finance Corporation by the Bridge Company". The board recognized outstanding obligations to Phoenix Finance Corporation as follows:

"On open account to June 30, 1933 and unpaid	$12,110.19 [3]
On notes to June 30, 1933 and unpaid	5,625.00" [4]

F. R. 203 (bottom) and 204 (top) cited by respondent are merely a part of the decree of December 1, 1936 in the Foreclosure Cause and are not helpful in establishing any *fact* in an ancillary proceeding where the original prevailing party has the burden of showing that it was a "right decree." In other words, this citation begs the whole point of the petitioner's alternative contention. In like manner, respondent cites F. R. 1704 (bottom) and 1705 (top) to prove this *factual* statement. This is simply a reference to the *opinion* of the Circuit Court of Appeals in the Foreclosure Cause. (As to the effect to be given an *opinion* of the Court in determining *res adjudicata,* see petitioner's brief, pp. 78-79.) It does not and cannot, in this ancillary proceeding where the decree is challenged as "wrong", establish a *fact. It is indeed significant that respondent is unable to cite a single* reference of fact to establish this contention.

(p. 35) Respondent gratuitously and without record references states: "The record shows that the Phoenix Finance Corporation took up the conspiracy where the Phoenix Finance System, Inc. left off". There is no evidence of any character to indicate any connection with any conspiracy or wrongdoing by Phoenix Finance Corporation.

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[3] The note for this amount was authorized at this meeting.
[4] These were the $3,125, $2,000 and $500 notes.

This is solely a creation of respondent's counsel, unsupported by the record.

(p. 36) Again, we find a total failure on the part of respondent to appreciate the legal effect of an ancillary and supplemental bill to implement and enlarge a former decree. The point is dismissed by respondent with this statement:

> "The court's original findings are fully sustained and are *res adjudicata* and we do not feel justified in pursuing the matter further."

From the very nature of this case, this is talk of the most specious character. In what category does respondent place the principle commonly known as "Lord Redesdale's Rule"? It recognizes no matter of *res adjudicata* in such a proceeding. The Bridge Company took "the risk of opening up" these very questions when it filed an Ancillary and Supplemental Bill to implement and enlarge a former decree.

Prior thereto, by the same counsel appearing in this court, Bridge Company had appeared generally in the Delaware suit, pleaded res adjudicata as a defense in each case and had actually tried one case solely on that issue. The filing of the Supplemental and Ancillary Bill was obviously an afterthought, when counsel after trying, briefing and arguing the Delaware case, came to realize that there was a grave question with respect to the scope and legal effect of any claimed adjudication against Phoenix arising from the decree in the Foreclosure Cause.

(p. 36) The respondent persists in its refusal to meet the issue with respect to the alleged non-production of its books by Phoenix Finance Corporation. The paragraph on this point is obviously recopied from a former brief and

no attempt is made to refute the factual statement (with record references) contained on pages 46 to 52 of petitioner's brief. *This is a basic misrepresentation of fact that has characterized the Foreclosure Cause in and since the hearing on the motion for modification.* It has been repeated and reiterated by counsel for the Bridge Company at every available opportunity in exactly the same language and with exactly the same supposed supporting references (references which deal with books of Phoenix Finance System, Inc., not required by the order (F. R. 93, 98)). At no time has the respondent been willing to meet the *facts* shown by the record as stated in petitioner's brief. *Accordingly, in this respect, the petitioner is justified in characterizing respondent's misstatement of facts as deliberate and wilfully intended to further the fraud already perpetrated* on the courts below (see also petitioner's brief, pp. 50-51).

(p. 37) Respondent says: "The *complainants* called John A. Thompson, president of *complainant,* Phoenix Finance Corporation * * *." Similar references to acts of *"complainants"* or "complainants' counsel" appear also on respondent's brief at p. 39 (two places), p. 40 (three places, 41, 54, 62 (footnote), 64 and 65. This is an obvious effort on the part of respondent to insinuate that Phoenix, which had been involuntarily impleaded as a *complainant,* participated at the trial and hearings of the Foreclosure Cause. In each place the word should correctly read "Trustee Complainants" or "Complainant Trustees" or "Complainant Trustees' counsel, Mr. Fowler" to distinguish the actual and indispensable complainants from the *formal* or *nominal* complainant, Phoenix Finance Corporation. If this correction were made there would then appear

to be no purpose for the statements or references at all. Accordingly petitioner feels justified in its accusation of a wilful attempt at deception on the part of respondent.

(pp. 51-52) Respondent has here referred to petitioner's Exhibit SC-106 (R. 584), the tender of evidence at the trial (R. 277-278) and petitioner's Exhibit SC-114 (R. 595-693) as "not a part of the record." True, these exhibits and tenders were *rejected* by the trial court, but the correctness of such rulings is a matter now before this court in determining (under petitioner's secondary contention) whether the petitioner, as the defendant to an Ancillary and Supplemental Bill to implement and enlarge a former decree is entitled to challenge such decree as "wrong." The evidence was offered in support of this contention and the rejected evidence is a part of the record in this appellate proceeding and relates to one of the principal questions for determination herein. Respondent seems to fail to grasp the proper scope of inquiries to be made in appellate proceedings.

(p. 55) Respondent states (without record references): "That said John A. Thompson, as shown by the evidence, moved said records to Florida." The obvious inference intended is that Mr. Thompson took the books out of the jurisdiction to avoid process with respect thereto. This is a most unfair insinuation, and is contrary to fact. The main office of Phoenix Finance Corporation was in St. Petersburg, Florida. The books were never in Des Moines, Iowa, until they were sent to Phoenix' branch office in that City pursuant to the order of April 24, 1934. After being kept at Des Moines for over a year for such use or inspection as interveners' counsel was entitled to make, but never in fact made, they were returned to the place where they

originated and permanently belonged, viz., St. Petersburg, Florida.

(pp. 59, 60) With respect again to the ever present issue of the alleged non-production of Phoenix' books, pursuant to order, respondent dismisses the comprehensive review of the facts stated on pp. 46 to 52 of petitioner's brief with the following:

> "That is a mere reargument of the petition for rehearing."

Perhaps such characterization is substantially accurate. *But that is just exactly what a defendant in such an ancillary proceeding to implement and enlarge a former decree may legally and properly insist upon.* The application of "Lord Redesdale's Rule" as above shown, necessarily comprehends a "reopening" or "rehearing" to ascertain the correctness of any challenged findings so that error or abuse, if any, may not be perpetuated and the Court not made "an instrument of injustice."

The statement of the respondent with respect to this subject in dealing with paragraph 43 of Phoenix' Answer and Counterclaim (p. 20, part of footnote 3) that "The record supports the court's finding * * *" does not, as herein and in petitioner's main brief (pp. 46-52) more fully discussed, bear the scrutiny of the record and is wholly unsupported by the record references cited. Evidence that the books were produced pursuant to the order was tendered (R. 276) and rejected by the Court (R. 287).

It is difficult to appreciate the motives actuating counsel in the deliberately false statement (p. 60) that "The fact is neither the books nor any entries therefrom were produced." The petitioner will welcome the opportunity at the proper time to fling this statement in the teeth of

counsel by positive proof that he received those copies, that those books were produced in strict compliance with the Court's order and that counsel failed to call at the place designated to examine them. The record references on this page, or any of them, do not, when scrutinized, support the allegations of respondent in this regard. They deceptively refer to books of Phoenix Finance System, Inc., which the Court refused to order produced (F. R. 92-96, 97-98) and they refer to the nonproduction *before the Master* whereas the Court ordered production at the *Phoenix office in Des Moines* (F. R. 98). The charge is and at all times has been a pure fabrication of counsel for the respondent and is fraudulent imposition upon the Court fortified only by the constant and persistent repetition thereof.

At the bottom of p. 59, respondent says that "Such production is claimed [by Phoenix] for the first time in this ancillary proceeding." This statement is wholly untrue. The question of alleged nonproduction was raised for the first time by motions and papers filed by interveners *at the hearing* on the motion for modification (F. R. 397) without prior notice to or opportunity on the part of Phoenix to answer the same. At that hearing (February 18, 1937), Phoenix orally resisted the charge. On appeal to the Circuit Court, the matter was briefed and again argued. The next opportunity was this Supplemental and Ancillary Proceeding. Phoenix has at every opportunity defended itself against this wholly unfounded charge.

(p. 64) On page 48 of petitioner's brief (including footnote 28, pages 48 and 49), petitioner has effectively demonstrated that the present contention that its legal debts and claims were adjudicated adversely to Phoenix in the Foreclosure Cause was an afterthought of counsel and not conceived to be the law at the hearings in that cause.

The petitioner points out stricken paragraph 40 of Phoenix' Answer and Counterclaim (R. 164-165) that—

> "In the said proceedings before the Master and on exceptions to the Master's report and at other times in the proceedings, counsel for the interveners [now counsel for the respondent] and counsel for the Bridge Company repeatedly asserted and represented that the indebtedness of the Bridge Company to any bondholder was not in issue and could not be adjudicated in such foreclosure proceedings."

This allegation presented as pleaded, a justiciable issue of fact. True, this allegation with others was stricken by the District Court. But this is one of the points implicit in the questions now before the court. Had the petitioner been permitted, it would have offered evidence to prove that allegation and such evidence would have taken the form of transcripts of arguments of, and quotations from, briefs filed by counsel for the intervener (the same counsel now appearing for respondent) and Bridge Company. At the trial below, counsel for respondent made the following presentation (R. 260):

> "Mr. Ontjes: * * * And we ask the Court, that, *without exception*, to take judicial notice of all the records, papers and files in this cause [the Foreclosure Cause] in connection therewith."

Such transcripts of arguments and briefs were a part of the "records, papers and files" so noticed. Consequently, petitioner is justified with respect to this stricken factual issue, in pointing out the *intrinsic* evidence in the case itself available to prove the point.[5] True, these briefs and transcripts

[5] In footnote 28, pages 48 and 49 of petitioner's brief, certain admissions were cited *by way of example only*. The transcripts of arguments and the briefs in the Foreclosure Cause furnish many additional items of evidential value in this connection which would have been offered if Phoenix had been permitted to

are not printed herein, but we are dealing primarily with the correctness of the ruling which eliminated the issue of fact thus tendered by pleading.[6]

(p. 65) Respondent here says that "trustees and Phoenix * * * continuously asserted that the considerations of the bonds were in issue and presented them as in issue." At p. 66, the same statement is substantially repeated. The facts are just the reverse. Phoenix made no assertion or presentation in this respect, except as hereinafter stated. Trustee's counsel, on the other hand, continuously contended that the bonds were not in issue and should not be proved or offered until the contemplated "second stage" (petitioner's brief, p. 15, footnote 13). The only

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prove its case under its alternative theory. In an affidavit made and filed by Intervener's counsel (same counsel now appearing for respondent) on August 17, 1934 in support of an amended and substituted petition for intervention, it was asserted by counsel that certain named *creditors* were "proper and necessary parties to a full and complete determination of the matters involved in this cause." The following, quoted from Mr. Ontjes' brief in support of the motion last above mentioned, might well have been written by counsel for petitioner. Therein, he said:

> "While it is the general rule that bondholders secured by deed of trust are assumed to be fairly represented by the trustees, in a case like this, where the question as to who are *bona fide* holders as to such bonds, is involved, the general rule would not apply and it is necessary that particular bondholders whose holdings are attacked should be made parties."

Of course, counsel in the foregoing did not classify or define the term "parties," but if it was "necessary" that the bondholders "should be made parties," it is a reasonable assumption that counsel meant that they should have the status of "indispensable parties" so as to support adjudications against them. As shown by petitioner's principal brief, this, as to Phoenix Finance Corporation, a Delaware corporation, would have defeated Federal jurisdiction (petitioner's brief, pp. 90-95). However, at a later point (F. R. 393), the same counsel apparently shifted his position and then claimed "That the Phoenix Finance Corporation was not a necessary or indispensable party, but merely a nominal or proper party * * *" and the Court so held (F. R. 211, 1692).

Intervener's brief on exceptions to the Master's report, p. 248, had further evidential value on this point:

> *"If any bondholder has any legitimate claim against the Bridge Company, he or she can sue at law subject to the defenses, set-offs and counterclaims of the Bridge Company."*

[6] If for any reason the Court should deem it material that such transcripts and briefs or relevant parts thereof be printed, the Court may make such order "as the circumstances may appear to the Court to require" (Rule 13 (9)). It was not felt by petitioner that these already voluminous records need be further enlarged as to this point. If the case goes back for a new trial under petitioner's alternative contention, a record will of necessity be made and preserved as to all of these prior admissions of counsel.

activity of moment of Mr. Sloan, Phoenix' counsel, an observer during the first or foreclosure stage of the proceedings, was to object to the introduction of bonds at that stage (F. R. 637). The Master so ruled (F. R. 637), saying: "*I think it is immaterial at this time.*"

Furthermore, at the close of the Mason City hearing before the Master, Mr. Ontjes moved for a decree "on the ground that the complainants have wholly failed to produce or account for the bonds in suit • • • ." (F. R. 691)

(p. 66, footnote 9) Respondent states: "What the Bridge Company's counsel stated in oral argument is immaterial since both the Court and the Master found that the Bridge Company was under the dominant control of John A. Thompson, president of Phoenix, and was not making a good faith defense • • •." The Bridge Company counsel who are quoted in footnote 28, page 49 of petitioner's brief were Messrs. Haehlen and Hart. Respondent conveniently overlooks the fact that both the Master and the court exonerated them from any charge or suggestion of domination (F. R. 134, 135, 161).

(p. 67) Petitioner concedes a printer's error with respect to the date, February *17*, 1937, as stated in the fourth line from the bottom of footnote 28 on page 49 of its brief. The date should have been February *18*, 1937. Because of this immaterial and wholly innocent mistake of *one day*, respondent says: "This is a deliberate misstatement of the record." However, in the same connection, respondent's brief contains an obvious printer's error which makes a mistake of *one year* in the sentence reading: "The hearing was had on the 18th day of February, *1938*." (8th line from bottom p. 67). The hearing was actually on February 18, *1937* (F. R. 411). This merely serves to illustrate the carelessness and intemperance with which respondent has dealt

with the record and petitioner's brief. Having made an innocent mistake of *one year* it is with poor grace that the respondent criticises petitioner for an equally innocent mistake of one day on a point of no materialty.

(p. 77) In the interest of accuracy and for the proper protection of its rights, Petitioner in this reply is constrained to call attention to the principal material misstatements of fact by respondent. This has necessitated much work and briefing which would not have been required if the zeal of respondent's counsel had not led him into continuous inaccuracies which can only, under the circumstances, have been wilfully intended. Thus at this page the bold statement is made that John A. Thompson "*was a witness on the part of Phoenix at the trial of this cause.*" As pointed out in Petitioner's Brief (pp. 17-21) Phoenix did not participate at the trial and offered no evidence of any character. *John A. Thompson was a witness for the intervener and the Trustee Complainants and the record references given by respondent for the above-quoted sentence and the sentence immediately preceding establish this fact.*

(p. 77—the John A. Thompson deposition) Here as elsewhere in respondent's brief are citations from this deposition. Beginning May 10, 1934, Mr. Thompson's deposition *as a witness on behalf of intervener* was taken before one H. L. Bump, Commissioner (F. R. 414-500). *The deposition was never read or offered in evidence by any party. It was not a part of the record before the Master or trial court.* However, after Phoenix' request for rehearing and modification had been denied and præcipe for appeal filed, the court ordered certain matter to be printed "for use in presentation of the question as to whether the trial court

arbitrarily and in abuse of discretion overruled appellants' motion for rehearing, *but for no other purpose*". The Thompson deposition was ordered printed at appellee's request "*as bearing upon the same subject*" (F. R. 216; motion of appellee therefor, F. R. 764).

In this deposition Mr. Thompson refused to answer certain questions, (for example, F. R. 428, 430, 433, 459, 477, 479, 498) which were clearly irrelevant to the issues and a part of a "fishing expedition" in aid of other litigation in which the Commissioner, as a practicing lawyer, had an interest (F. R. 421). Intervener thereupon applied to the District Court for the Southern District of Iowa, Central Division "for the issuance of a citation for contempt." (No. 886-Law; see also F. R. 499 referring thereto). District Judge Dewey on July 28, 1934 "Ordered that the application be denied and refused." *In other words Mr. Thompson's contention that the questions were irrelevant to the issues was, after hearing and argument, fully justified and sustained.*

(pp. 79, 80). Here respondent refers to the $50,000 mortgage as being "fraudulent, wholly without consideration and void" and the $35,000 and $15,000 checks evidencing loans secured thereby as being "endorsed by the bridge company without consideration and returned to Phoenix, issued in connection with the making of false entries." This is a typical example of the successful legerdemain by counsel for respondent which resulted in findings in the Foreclosure Cause adverse to Phoenix without supporting record evidence, and, in many instances, contrary to unimpeached record evidence. Because counsel *charged* it, the allegation was accepted as a fact without evidence and, since Phoenix offered no evidence, went substantially by default. Petitioners' secondary contention permits these

"wrong" and wholly unsupported findings to be challenged on the Ancillary and Supplemental Bill to implement and enlarge the Foreclosure Decree. At the trial below Phoenix offered its evidence (R. 278, 289) to show that the Bridge Company received this money. The evidence was rejected (R. 287, 290). It is significant that, although the trial court may have been imposed upon in this respect, the true facts were sufficiently apparent and established by the financial records of the transaction to enable a reputable auditing firm of the standing of Ernst & Ernst to certify thereto (Exhibit S. C. 114, R. 595-693 at pages 599 and 611).

(p. 93) Respondent here purports to quote from Master's Conclusions of law No. 5 in the Foreclosure Cause (F. R. 136). In this quotation appears the following: "• • • and *the Phoenix Finance showing* made in the first instance • • • ." Heretofore on at least two previous occasions in the course of this litigation, counsel for petitioner has had occasion, in answering or reply briefs, to direct the attention of both counsel and court to the error whereby respondent has persistently misquoted, as above, the phrase: "• • • and *the prima facie showing* made in the first instance". (F. R. 136, line 8). In fact in the Delaware case counsel for the Bridge Company, upon the matter being called to his attention, *stipulated* to the correction. It was originally thought that this was a wholly innocent error arising as a result of sound similarity in dictation. *Now counsel for petitioner is convinced that the error is and always has been deliberate and intentional and devised to make it appear that Phoenix did participate in the trial of the Foreclosure Cause by some "showing" of evidence.*

(p. 99) Respondent's statement that the court found in the Foreclosure Cause that Phoenix Finance System, Inc. (and through it Phoenix Finance Corporation) "had

become indebted to the bridge company in an amount of $26,085.85'' is not established by the findings cited, in that amount or in any amount (F. R. 193, 194, 202). Furthermore as to the $14,000 set-off or counterclaim (which respondent evidently intended as parcel of the above amount) it is pointed out in Petitioner's Brief (pp. 79-80) that there can be no justiciable set-off in the absence of appropriate pleading, and in Petitioner's Brief (pp. 90-95), that the Federal Court lacked jurisdiction to adjudicate a legal claim of this character between two Delaware corporations. In addition, petitioner challenges as ''wrong'' in this ancillary proceeding the finding to this effect. At the trial its tendered evidence was rejected by the court, as above shown.

(p. 103) Here respondent states that ''The Phoenix' *erroneous assertions* have made it necessary to unduly lengthen this brief by quotations from the record.'' Thereupon for the next twenty-four pages (pp. 103 to 127), respondent intermingles quotations from the two records and draws conclusions from other references in such a way as to be unintelligible and wholly confusing. *The findings in the case below are the very findings this court is asked to review. The findings in the Foreclosure Cause are challenged and one of the questions of law for this court to consider is whether the court below erred in refusing to permit petitioner to challenge those findings.* This portion of respondent's brief adds nothing to petitioner's statement, points out no error therein, is wholly surplusage, and is obviously designed to confuse the court as to the real issues of law presented. Respondent in this part of its brief quotes and argues at length from pleadings directed against *Phoenix Finance System, Inc.* and attempts (wholly futilely) to make it appear that such pleadings raise issues

against *Phoenix Finance Corporation.* At p. 105 the respondents' statement that Phoenix in any manner "took issue" with intervener's charges with respect to the 517 shares of "A" stock is wholly untrue and no record reference being cited therefor, should be ignored.

(pp. 113, 114, 115) With respect to the Financing Agreement (characterized by respondent as "the fraudulent guaranty agreement") in suit in Delaware (Exhibit S. C. 104, R. 522 *et seq;* Petitioner's Brief pp. 31-34) it is pointed out (at the expense of repetition) that this was a three-party contract between the Bridge Company, Phoenix Finance System, Inc., and John W. Shaffer & Co. (F. R. 1393). Phoenix Finance System, Inc., was never in court in the Foreclosure Cause. Service as to it was quashed (F. R. 99, 109, see Marshal's return, F. R. 89). No attempt was made to implead Shaffer & Co. and that corporation nowhere appears in the case as a party of any grade. Admittedly, even Phoenix Finance Corporation was only a "formal" or "nominal" party. It is inconceivable under any theory, known or suggested, how a valid adjudication nullifying the contract as "fraudulent" could be made in a suit to foreclose an entirely unrelated trust indenture and to which two of the contracting parties were in no way litigating parties. However, and quite apart from the technical pleading and issue aspect, any finding on this point is challenged by petitioner as "wrong" in this ancillary proceeding, and, under petitioner's alternative contention, it is submitted, this challenge should be recognized and the defense (not offered or proper to be offered in the Foreclosure Cause) admitted. Petitioner's tendered evidence at the trial of this ancillary cause was rejected, as heretofore shown.

The Alleged Control of Bridge Company by the So-called Phoenix Group.

On page 54 of petitioner's brief, it was stated with respect to the factual issues, in the event this case is remanded for retrial under petitioner's alternative contention—

> "A discussion as to what those facts are specifically and what detailed evidence is available to prove or disprove the same has no place on this writ of certiorari."

In a footnote (29, p. 54), petitioner gives an outstanding example of a "wrong" finding of fact in the Foreclosure Cause which will be controverted if that case be "reopened" by the application of "Lord Redesdale's Rule." The factual point was not deemed proper for major consideration at this stage and for that reason was stated in a footnote.

However, respondent's brief at various points and particularly by elaborate notes on pages 68 and 69, seeks to establish affirmatively and as a fact that there was an interlocking directorate exercising domination and control over the Bridge Company at the time the trust indenture, the bonds, and other obligations were authorized and issued.

In view of respondent's repeated reference to *Geddes v. Anaconda Mining Co.*, 254 U. S. 590 (brief, pp. 107, 141, 161), and the argument therefrom that the alleged common directorate is in itself a badge of fraud, the petitioner now deems it advisable and necessary, even at the expense of a substantial extension of this reply brief, that the record on this point be reviewed and accurately analyzed.

It must be borne in mind, in a consideration of this problem, that the "control" contended by Respondent was

an alleged *improper* control or control for an *improper* purpose. At every corporate stockholders' meeting there is majority voting in the election of directors and with respect to matters of corporate business and policy. It is an improper implication to say that such majority, be it a person or group of persons, thus "controlled" the corporation in any unlawful or presumptively fraudulent sense. Furthermore persons or groups holding and voting proxies only do so by reason of voluntarily conferred and revocable powers of attorney which are only given when a stockholder has confidence in his designated agent and has voluntarily determined that his stock should be voted on some corporate issue of which he has had due notice in a predetermined manner. If proxy holders have sufficient stock and proxies to determine a given corporate election or issue, this is not "control" in the sense intended by Respondent. We are here concerned solely with alleged control by an interlocking directorate of two corporations having business relations with each other which (with respect to the corporation benefiting thereby at the expense of the other) would be an improper control or a control for an improper purpose. *No "control" in this sense existed at any time, as herein more fully demonstrated.*

Phoenix Finance System, Inc.

John A. Thompson and wife owned together a total of 11¾% of the total voting stock of Phoenix Finance System, Inc. (F. R. 355). The balance of over 88% was held by 573 stockholders scattered over thirteen states (F. R. 355). The total amount of the capital stock of Phoenix Finance System owned by all persons who were ever officers and directors of the Bridge Company was less than 26% (F. R.

355). Phoenix Finance System had a board of thirteen directors from and after February 11, 1931 (F. R. 636), and throughout the period during which it had any connection with the Bridge Company. John A. Thompson did not control Phoenix Finance System, Inc. through stock ownership, and he did not and could not have dominated and controlled its officers and directors (F. R. 356, 255, 282, 287, 291, 303, 377). Thompson & Co. was a wholly owned subsidiary of Phoenix Finance System, Inc. (F. R. 558).

Phoenix Finance Corporation.

There were no pleadings of any kind as to Phoenix Finance Corporation but as to that corporation John A. Thompson testified that "the combined stockholdings of Mrs. Thompson and myself and Mr. Wilder and Mr. English during the years 1932, 1933 and 1934 would have been more than fifty-one per cent. of the total common stock" (F. R. 674). Phoenix Finance Corporation was incorporated December 29, 1931 (F. R. 542). Mr. Wilder died in 1935 and had been a stockholder of Phoenix Finance Corporation to the extent of $150,000 (F. R. 674). Mr. and Mrs. Thompson together at the *highest* point of their stock ownership lacked fifty shares for voting control (F. R. 673). Emory H. English stated that he had an investment in Phoenix Finance System, Inc. and Phoenix Finance Corporation of approximately $15,000, that "he owed no obligation of any kind to John A. Thompson", and that he was never a "tool or strawman or dummy director for John A. Thompson or anybody else" (F. R. 264). Mr. English further stated (F. R. 265):

> "I attended many stockholders and directors meetings of Phoenix Finance System, Inc., and Phoenix Finance Corporation and it was a uniform experience

in those meetings that they were conducted fairly and without the employment of tactics that would preclude the exercise of private initiative and independent judgment on the part of the directors.

"John A. Thompson's incumbency in the office of president was the result of the choice made by the directors of the Company and not as a result of any compulsion to do so because of his stock ownership."

The board of directors of Phoenix Finance Corporation were three in number from December 29, 1931 (the date of incorporation) to February, 1932 (F. R. 636). The first three incorporators were "Joseph S. Hatch and two of his associates in Wilmington, Delaware" (F. R. 435). After February, 1932, and during the balance of the critical period the directors were twelve in number (named in F. R. 1385; see also F. R. 636, 637). Nine affidavits in the Foreclosure Record denied that there was at any time any domination, control or coercion of these directors by John A. Thompson or anyone else (F. R. 255, 264, 265, 282, 286, 291, 303, 339, 355, 377).

The Bridge Company trust deed and bond issue was authorized at a special meeting of the stockholders held on December 22, 1931 (F. R. 946, 952, 953), prior to the incorporation of Phoenix Finance Corporation (F. R. 542). The bonds were dated January 1, 1932 (Exhibit 2 (HEB), F. R. 775). *This was prior to the election of the twelve member board above mentioned and prior to any of those persons becoming directors of Phoenix Finance Corporation.*

Iowa-Wisconsin Bridge Company.

In the Foreclosure Cause, the Master found (F. R. 129) and the Court approved (F. R. 179, 180) the following alleged facts:

"4 (a). That John A. Thompson, above named, before the issuance of the said bonds and before the authorization of the said trust deed, came into the control and management of the defendant, Bridge Company, either directly or through the Standard Shares Holding Company.

(See deposition of V. W. O'Connor, pages 4-6; testimony T. H. Bakewell and admissions of John A. Thompson on cross-examination, Mason City; deposition John W. Shaffer, pages 79-81; stock record of Iowa-Wisconsin Bridge Company and stock certificate books of Iowa-Wisconsin Bridge Company; testimony of M. White, pages 23MM to 25MM; O'Connor deposition, pages 11-23; deposition of A. B. Wilder, page 2; deposition Oscar R. Thorson, pages 3 to 17; M. White, page 10MM; Minute book, Iowa-Wisconsin Bridge Company; Shaffer deposition, p. 5 and top of p. 6; White deposition, Int. 164-167; M. White deposition, pp. 16MM to 22MM).

(b) That during all that time and during the times hereinafter named, the said Thompson also controlled the Phoenix Finance System, Inc., and other affiliated Companies.

(See deposition of Thompson taken at Des Moines and Mason City; deposition of M. White; testimony of T. H. Bakewell, trial at Mason City; O'Connor deposition, pp. 4-6 and 11-17; White deposition, pp. 72MM-77MM; Journal Iowa Bridge Company, p. 58, lines 9-11; Thompson, while testifying, in effect conceded that during the time named he controlled the Phoenix Finance System, Inc., and he and his associates could control the defendant, Bridge Company)."

There is not a single record reference thus given by the Master which properly supports those findings. A detailed analysis of each record reference would involve prohibitive space in this reply brief, and *petitioner contents itself with*

the confident assertion that there is an utter dearth of competent record evidence to support the findings above quoted. By the application of "Lord Redesdale's Rule" under petitioner's alternative contention, and when and if the foreclosure decree is "re-opened" for challenge and judicial scrutiny, an opportunity will be presented to petitioner to make an exhaustive analysis of the existing record as well as to present *its own evidence* with respect thereto.

It was just such findings as these that induced Phoenix Finance Corporation to petition for a rehearing which would have enabled it to point out the incorrectness thereof and to introduce on its own behalf even more conclusive evidence than is actually in the record, to prove the contrary. The rehearing or requested modification was denied *solely* because of the fraudulent imposition upon the court by counsel for the intervener (now counsel for the respondent) of the utterly false charge that Phoenix had refused to produce books pursuant to a court order (see petitioner's brief, pp. 46-52).

On the other hand, the record actually made in the Foreclosure Cause (without any evidence by Phoenix) *affirmatively disproves* the findings. As to the ownership of stock qualified to vote at the Bridge Company stockholders' meetings during the critical period, John A. Thompson, M. K. Thompson (his wife), A. B. Wilder, Emory H. English, M. White, Thompson & Co., Phoenix Finance System, Inc., and Phoenix Finance Corporation together owned only the following percentages (F. R. 311, 1036, 1301):

November 11, 1930	—3%
March 10, 1931	—36.7%
December 22, 1931	—18.5%
March 8, 1932	—22.6%
July 8, 1933	—24%

This assumes for the purpose of argument that Mr. Thompson directly or indirectly exerted a measure of control over Messrs. Wilder and English and over Thompson & Co. and Phoenix Finance System, *an assumed situation which is not a fact.* (F. R. 231, 264, 265, 266, 282, 290, 339, 372, 379, 630, 631).

This establishes the fact that no control existed by virtue of majority stock ownership. However the respondent says (brief p. 68, footnote 10):

> "Petitioner makes no reference to evidence before the Master, and the court, showing proxies procured and held in the names of persons under the control of said John A. Thompson and associates of Phoenix, nor to the evidence showing their control of other directors of the Bridge Company."

A complete answer to any inference of improper control for any purpose or exercised in any manner will appear in the following resume of facts.

The November 11, 1930, meeting of Bridge Company stockholders was adjournred to November 26, 1930, after the election of directors (F. R. 869, 871, 876). Being an adjourned meeting, the shares qualified to vote were necessarily determined as of the original meeting date. At the adjourned meeting on November 26, 1930, contracts vital to this case were approved and authorized, including the Financing Agreement between Bridge Company, Phoenix Finance System, Inc., and John W. Shaffer & Co. (R. 540) and the Superstructure Contracts which brought about Phoenix Finance System's "guarantees" under the Financing Agreement for bridge construction payments. The cash loans evidenced by the notes and contracts in suit in Delaware and the $50,000 mortgage (with its underlying in-

debtedness of the amount and the additional advance of $9,000) were all the result of and interdependent upon the contracts so authorized and approved. Therefore, the question whether the so-called Phoenix groups (meaning thereby, for purpose of argument only, the individuals and corporations above mentioned) controlled or dominated this meeting may have been considered a question of some importance in the Foreclosure Cause.

As above shown, the so-called Phoenix group owned but 3% of the then outstanding stock qualified to vote. *However, the significant fact is that the Phoenix group did not in person or by proxy vote a single share of stock either for the election of directors on November 11 or for the approval of said contracts at the adjourned November 26, 1930 meeting* (F. R. 865, 877). Furthermore this was an annual meeting with full notice and the old board was reelected by unanimous vote without dissent or objection (F. R. 868).

Notwithstanding the foregoing and the fact that counsel for respondent has had this matter called to his attention repeatedly, he deliberately persists in false and untrue implications in this respect. The following is taken from respondent's brief (p. 69, footnote 10):

> "On November 26, 1930, Thompson & Company, a wholly owned subsidiary of Phoenix (F. R. 545), John A. Thompson and A. B. Wilder held 1834 voting shares, more than one-half of the total voting stock authorized. 1800 shares of this had been issued to Shaffer & Company on that date and immediately transferred to Thompson & Company. (F. R. 596, 1305, 1335)"

Shaffer & Company received the 1800 shares after the November 26, 1930, meeting and in pursuance of the contract approved thereat (F. R. 879, 596). *No part of the*

1834 shares participated in any manner at the meeting of November 11, 1930, or at the adjourned meeting of November 26, 1930. This is a typical example of the manner in which counsel for respondent, throughout the various stages of the case, has imposed upon the Court. The implications counsel obviously intended the court to draw from the above quoted paragraph and the implication the court would necessarily draw therefrom, were it not otherwise explained, are that the so-called Phoenix group controlled and dominated the meetings of November 11, 1930, and November 26, 1930. As above shown, this is not a fact, and counsel's insinuation in this respect can only be characterized as a wilful effort improperly further to deceive, influence and impose upon the court. Otherwise it is impossible to understand the purpose for which this paragraph was written.

The attention of the court in this connection is called to the fact that the applicable section of the Delaware Corporation Law, then in force, prohibited the voting of shares "transferred on the books of the corporation within twenty days next preceding such election."[7]

Respondent further states (footnote 10, p. 69) that:

> "At the meetings on November 11 and November 26, 1930, 1500 shares were voted by Shaffer, as president of Standard Shares Holding Company, which was controlled by him, and 664 shares by V. M. O'Connor."

This may be true, but what does it prove? There is not a scintilla of evidence that Thompson or any Phoenix com-

[7] 1931 Sec. 17, Revised Code, Delaware, 1915:
Voting Power of Stockholders; by Proxy; Limitation of:—Unless otherwise provided in the charter, certificate or by-laws of the corporation, each stockholder, whether resident or non-resident, shall at every meeting of the stockholders be entitled to one vote in person or by proxy for each share of the capital stock held by him, but no proxy shall be voted on after three years from its date; *nor shall any share of the stock be voted on at any election which has been transferred on the books of the corporation within twenty days next preceding such election.*

pany had any control over, or identity of interest with, Standard Shares Holding Company [8] or that Mr. O'Connor or Mr. Shaffer had any connection with the so-called Phoenix group. Such is not the fact, and there is nothing in the record to so indicate, directly or inferentially. In fact the record proves the contrary (F. R. 680, 339, 343, 355, 382, 447).

The only proxies voted at the meetings of November 11, 1930 and November 26, 1930 were the 664 shares represented by O'Connor (F. R. 865-867, 877). Respondent says (footnote 10, p. 68):

> "John W. Shaffer and Vernon W. O'Connor were promoters of the Bridge Company and John A. Thompson acquired control through them about November 1, 1930."

This is a gratuitous statement advanced without the slightest supporting evidence and is wholly untrue.[9] (See F. R. 261, 299, 339, 342, 390). O'Connor never met Thompson until November, 1930 (F. R. 448, 637). O'Connor says he did not vote his shares for the bond issue at the meeting of December 22, 1931 (R. 647). He had personal interests opposed to Phoenix (F. R. 353, 643, 647, 856). He was never dominated or controlled by Mr. Thompson (F. R. 257, 299, 346, 365, 380, 390).

Respondent also gratuitously asserts (footnote 10, p. 68) that: "John A. Thompson, with his wife, M. K. Thompson, and his associates, A. B. Wilder and Emory H. English, controlled Phoenix." *No record references are cited*

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[8] This is confidently and vigorously inserted notwithstanding finding 4 (a) above quoted (F. R. 129).

[9] Even the Master in his recital of historical facts (not findings) merely states (F. R. 123) that "Thompson *is said* to have acquired control of the stock in the Bridge Company" as the result of negotiations with Shaffer and O'Connor. *This was said* by interveners *but never proved*, and such is not the fact.

for this statement and none exist. As above shown, the statement is a pure fabrication, but even if it had been true Phoenix in turn, as herein shown, did not control the Bridge Company, because the combination of the Phoenix corporations and the individuals (including M. White and Mr. and Mrs. Thompson) never at any time had a majority stock interest (F. R. 311, 287, 339, 343, 356, 364, 390, 391, 1305, 1309, 1311).

Again respondent (footnote 10, p. 68) insinuates that Oscar R. Thorson, who became a director and secretary-treasurer of the Bridge Company November 26, 1930 (F. R. 548, 608, 881) was under the control and domination of John A. Thompson, who had become a director and president of the Bridge Company on November 1, 1930 (F. R. 862). At p. 81, footnote 15, respondent boldly calls Mr. Thorson "his employee". Mr. Thorson was a salaried full-time officer and the general manager of the Bridge operations (F. R. 347, 921). He was not an officer, director, stockholder or employee of Phoenix Finance System, Inc., Phoenix Finance Corporation or Thompson & Co., and had no interest in or connection with the so-called Phoenix group or any of the individuals connected therewith (F. R. 279, 281, 290, 339, 347, 380-381, 543, 548, 614, 626, 641). He was never dominated or controlled by anyone (F. R. 347). He first met Mr. Thompson about November 1, 1930 (F. R. 608).

Mr. Thorson himself stated (F. R. 348):

> "That throughout the entire period that I was associated with said Bridge Company as above described I always acted in good faith, was not in any way interfered with in the free exercise of my duties as an officer and director of the Bridge Company. That in every instance my approval and vote represented my own personal judgment and conviction."

Mr. Thompson testified that Mr. Thorson had no connection with Phoenix (F. R. 543). Emory H. English, A. B. Wilder and Vernon W. O'Connor testified to like effect (F. R. 614, 626, 641). Mr. Thorson testified that he was not consulted about becoming a director prior to his election, and with respect thereto further said that he had no talk with Mr. Thompson on that subject and that he saw Thompson but infrequently (F. R. 608). It is worthy of note that this is the same Oscar R. Thorson who has served the court as its Receiver in this case for the past seven years (F. R. 69).

The stockholders' meeting of December 22, 1931, is the crucial point to ascertain the facts with respect to control and domination of the Bridge Company. Respondent has stated (footnote 10, p. 69) that "John *A*. Thompson by proxy and in person, Oscar R. Thorson by proxy and in person, Mrs. John A. Thompson, and M. White, John A. Thompson's secretary, voted 1709 shares, or more than half the stock represented in person and by proxy." Here again, with his intimate knowledge of the facts, counsel has indulged in another deliberate and wilful attempt to deceive the court. The record shows that Oscar R. Thorson, John *H*. Thompson and Emory H. English were named in proxies for 1,020 shares voted at the meeting (F. R. 947-949). John *H*. Thompson individually and by proxy voted 24 shares (F. R. 951). John *A*. Thompson voted 642 shares (F. R. 957, 958).

John *A*. and John *H*. Thompson are two distinct persons, not related, had no business or other connections, and were not even acquainted prior to November, 1930 (F. R. 364). John *H*. Thompson was a banker in Lansing, Iowa, had a financial interest himself in the company, and

was in no way controlled by John *A.* Thompson (F. R. 231, 279, 339, 364, 381).

At the date of the December 22, 1931, Bridge Company stockholders' meeting, there were 3,750 voting shares issued and outstanding (F. R. 311, 591). The record of stockholders present in person or by proxy is shown by the minutes (F. R. 946-959). 184 stockholders voted 2273 shares *for* the bond issue (F. R. 954). 30 stockholders voted 335 shares *against* the bond issue (F. R. 958). The affirmative vote *for* the issue was 87% of the shares present. 1579 shares were voted for the issue exclusive of shares owned by Phoenix Finance System, Inc. (500 shares), John A. Thompson (137 shares), M. K. Thompson (20 shares), Emory H. English (1 share), M. White (18 shares), A. B. Wilder (18 shares), a total of 694 shares. 1914 shares exclusive of so-called Phoenix group, or a majority of the shares issued and outstanding, were present for the purpose of quorum. The affirmative vote *for* the bond issue may be further analyzed as follows (F. R. 947-958):

By joint proxy to Oscar R. Thorson John *H.* Thompson and Emory H. English	1,020 shares
By proxy to John *H.* Thompson	23 "
By proxy to John *A.* Thompson (including shares of Phoenix Finance System, 500 shares and Sven S. Norling 5 shares	505 "
By John A. Thompson in person	137 "
Other individual stockholders in person	588 "
Total	2,273 "

It is to be noted that the notice of meeting (F. R. 959-960) and the form of proxy (F. R. 960-961) give complete information to stockholders with respect to the proposed bond issue to be voted upon at the impending meeting.

In petitioner's principal brief (pp. 54, 55, footnote 29) it is pointed out that at no time during the period in question were there ever more than four out of eleven directors, (only 2 out of 11 during the most critical period) participating in any Bridge Company meeting who had any connection with the so-called Phoenix group. From November 1, 1930, to September 25, 1933 (date of receivership) twenty-six persons served from time to time as directors of the Bridge Company. A. M. Nystrom was elected on March 10, 1931, but never served or participated in a meeting and resigned May 4, 1931. As to the other twenty-five active directors, the evidence is conclusive that at no time were they ever under any improper control or domination of Phoenix Finance System, Inc., Phoenix Finance Corporation, John A. Thompson, or any associate. Specifically this appears in the following:

1. T. H. Bakewell (an Intervenor in this cause F. R. 104) (F. R. 231, 242, 247, 262, 265-267, 271, 279, 283, 339, 343, 347, 353, 365, 368. See also 687-688 indicating "harmony," not "control").
2. Harold Bohn (F. R. 262, 279, 339, 343, 347, 368).
3. J. W. Dempsey (F. R. 231, 242, 262, 265-267, 279, 283, 339, 342, 347, 351, 353, 365, 368, 687-688).
4. N. W. Ellsberg (F. R. 262, 279, 339, 343, 347, 368, 629).
5. H. G. Foote (F. R. 265-267, 279, 339, 365, 368, 687-688).

6. H. W. Gaunitz (F. R. 265-267, 269, 279, 280, 339, 368, 379).
7. C. F. Fish (F. R. 265-267, 268, 279, 280, 339, 368, 379).
8. F. Hartman (F. R. 265-267, 269, 279, 280, 339, 368, 379).
9. H. Haehlen (F. R. 265-267, 269, 279, 280, 339, 365, 368, 379).
10. G. W. Huntley (F. R. 265-267, 269, 279, 280, 339, 368, 379).
11. M. E. Lockhart (F. R. 262, 279, 339, 343, 368, 347). Resigned 11-26-30 (F. R. 881).
12. F. J. Natchtvey (F. R. 265-267, 279, 339, 365, 368).
13. Edward O'Connor (F. R. 262, 265, 279, 343, 347, 339, 368).
14. V. W. O'Connor (F. R. 262, 265-267, 279, 283, 339, 343, 347, 353, 365, 368, 370). First met J. A. T. Oct. 1930 (F. R. 638).
15. H. A. Schremser (F. R. 265-267, 279, 339, 365, 368, 687, 688).
16. O. R. Thorson (F. R. 231, 262, 265-267, 279, 281, 283, 290, 339, 347, 365, 368, 380, 608, 881). Not connected with Phoenix (F. R. 543, 548, 614, 629, 291).
17. John H. Thompson (F. R. 231, 265-267, 279, 339, 351, 364, 368, 380, 548, 687, 688, 921).
18. C. H. Young (F. R. 262, 390, 279, 339, 343, 347, 368, 626).
19. H. T. Wagner (F. R. 231, 262, 265, 270, 279, 280, 290, 339, 343, 347, 365, 368, 379, 547). Dfts. Answer (F. R. 65) states new Board 7-8-33.

Wagner was one of them (F. R. 1041). Not connected with Phoenix (F. R. 265, 279, 368, 674, 290).

20. D. F. Wolfe (F. R. 265-267, 269, 279, 280, 339, 378).
21. E. H. English (F. R. 231, 264, 266, 265, 291, 339, 365, 368). Not connected with Phoenix when testimony given (F. R. 267).
22. M. White (F. R. 231, 265-267, 339, 365, 368). Participated in only two directors' meetings (See Ex. 6 HLB (F. R. 861)). Not employed by Phoenix when testifying (F. R. 456).
23. A. B. Wilder (F. R. 231, 262, 265-267, 282, 290, 339, 343, 367, 372, 379). Was a banker (F. R. 630).
24. John A. Thompson (F. R 231, 262, 266, 343, 282, 291, 339, 367, 368).
25. M. K. Thompson (F. R. 265-267, 339). Never participated as director until March 7, 1932 (Minute book, F. R. 861 *et seq.*).

It is emphasized that any stockholders' meeting of which there was due notice as to the purposes, and where stockholders, in pursuance to such notice have executed and returned proper proxies, and have made no complaint with respect to the voting thereof, (as in the instant case), it is but idle talk of no legal significance to say that the proxy holder or holders *controlled* the meeting. Any person or group of persons having a sufficient number of votes in person or by proxy at any corporate stockholders' meeting may *control* that meeting. In the same manner, counsel for the respondent and his associates now *control* the Bridge Company. When the stockholders lose confidence in the persons soliciting proxies, they will not give them. Where stock-

holders do not give a proxy or attend in person, they cannot be heard to complain.

The respondent (p. 69, footnote 10) refers to the fact that at the meeting of July 8, 1933, 1415 shares by proxy were not permitted to vote. This was because "of the by-laws requiring proxies to be filed with the Secretary of the corporation at least five days before the meeting" (F. R. 1038, 1039). Furthermore the meeting elected a new board of seven members *no one of whom had any Phoenix association* (F. R. 1041) and still more important there was no transaction after July 8, 1933 involved in this litigation.

The petitioner recognizes that as to disputed facts upon which there is conflicting evidence, the findings of the trial court are ordinarily not subject to review. Of course, there is the exception in the case of an ancillary proceeding to implement and enlarge a former decree (petitioner's secondary or alternative contention). *In the foregoing, however, petitioner has stated only facts that are uncontroverted on the record by even a scintilla of evidence.*

REPLY TO RESPONDENT'S ARGUMENT.

A.

Respondent's Argument With Respect to Petitioner's Primary Contention.

(Points I to VI; Petitioner's Brief, pp. 63-96; Respondent's Brief, pp. 128-200.)

As herein summarized, *Petitioner's Primary Contention is that the decree in the Foreclosure Cause did not constitute a valid adjudication against Phoenix with respect to Phoenix' choses in action mentioned in the Supplemental and Ancillary Cause.* The several points of law underlying this contention are Points I to VI of petitioner's brief.

Point I is the *premise*, viz., that the problem is to be *approached and tested* by an examination of the legal principles relating to the defense of *res adjudicata* and relating to the application of the "Full Faith and Credit Clause." Accordingly, a complete lack of understanding is evidenced by respondent when it is stated (p. 128) that "The writ does not involve the question whether the Federal Court gave full faith and credit to the decisions of another court." *The question is whether the decree of December 1, 1936 in the Foreclosure Cause is entitled to full faith and credit in another court.* The Delaware Court has answered this question in the negative.

Phoenix Finance Corporation v. Iowa-Wisconsin Bridge Company, 14 Atl. (2d) 386.

On the other hand, the court below by enjoining prosecution of the Delaware actions answered the question in the affirmative. Petitioner has no criticism of the legal principles stated at this point of respondent's brief (pp. 128-130) but, for the reasons herein stated, the same can have no possible application to the problem before the Supreme Court.

Point II of respondent's brief (pp. 131-180) is respondent's argument with respect to identity of parties and issues and the doctrine of representation. Petitioner's brief (pp. 66-84) deals with the same points and further discussion is deemed unnecessary.

Petitioner does not challenge the correctness of the doctrine of *Plumb v. Crane, Adm.*, 123 U. S. 560. That case merely holds that where an unnamed party is represented by his trustee in the conduct of litigation, such unnamed *cestui* is bound *by the decree therein*. Thus, in the Foreclosure Cause (subject always to petitioner's alternative contention with respect to "Lord Redesdale's Rule" in its application to an ancillary proceeding to implement and enlarge a former decree), Phoenix, a bondholder, being represented by the Trustee Complainants, was bound by the decree *denying foreclosure*. The effect of the decree must of necessity be limited to the issues and relief prayed.

Respondent has wholly failed to answer petitioner's position that the purported adjudications of Phoenix' contract claims against Bridge Company, and Bridge Company's claims (if any) against Phoenix *were not within the issues* of a bill in equity brought by the trustees of a mortgage deed of trust to foreclose the same with respect to mortgaged property within the jurisdiction of the court. As to practice, procedure and a determination as to the proper *scope* of such a proceeding, respondent and petitioner appear to agree that Iowa law and decisions have persuasive application.

It is emphasized that for a determination of the *subject matter* of litigation, it is first necessary to examine the *prayers* of the moving pleading. Thus, in the recent Iowa case of *Federal Land Bank of Omaha v. Jefferson* (decided January 21, 1941), 295 N. W. 855, the court said (p. 857):

> "* * * However, it is necessary not only for the court to have jurisdiction of the parties, but also jurisdiction of the subject matter, and even though the court has jurisdiction of the parties, if it has no jurisdiction of the subject matter, it has nothing before it to determine. (citing cases)
>
> "In determining what constitutes the subject matter of the litigation, it is necessary to examine the prayer of the plaintiff's petition. This court has repeatedly recognized that the relief to be afforded is limited by the prayer of a petition." (citing cases)

The court also quoted from the Iowa Code as follows:

> "* * * The judgment in rem is measured by the property in court."

The *Jefferson* case has a three-fold significance with respect to petitioner's argument because—

First—the Iowa rule that one need not fear a pleading in which there is no prayer affecting his legal rights, is further justification for the acceptance by W. B. Sloan, Esquire, attorney for Phoenix Finance Corporation, of the "two-stage"-theory of the parties (see petitioner's brief pp. 14-17; 83-84).

Second—the mortgage foreclosure proceeding, being *in rem* or *quasi in rem* (*Ingram v. Jones*, 47 F. (2d) 135, 140; *Wilson v. Alliance Life Ins. Co.*, 108 F. (2d) 150, 152; *Bride et al. v. Stormer, et al*, 291 Ill. App. 502, 10 N. E. (2d) 208, 209) there properly could not have been, and there was not in fact, any pleading or prayer for *personal* relief against Phoenix Finance Corporation. Accordingly by the applicable Iowa procedural law, there could not have been a *personal* adjudication against Phoenix with respect to the issues of the Delaware cases or with respect to the

issues implicit in an assertion of the $50,000 mortgage or the $50,000 note and $9,000 open account secured thereby.

Third—All the cases cited by respondent (both state and Federal) relate to adjudications responsive to pleaded issues and responsive to affirmative prayers for relief. Therein lies the fundamental distinction between petitioner's and respondent's respective arguments and the essential difference in this respect between the *Plumb* case, *supra,* and the *Jefferson* case, *supra,* serves as an effective illustration.

If respondent is to be construed as contending that there were intervener's pleadings and prayers in the Foreclosure Cause against *Phoenix Finance System, Inc.,* the obvious answer is that *System* was not in court and that process as to it had been quashed (F. R. 99-109). The argument herein stated is, of course, quite apart from petitioner's alternative or secondary contention and quite apart from Point VI of petitioner's brief (pp. 90-95) to the effect that even if there had been pleaded issues and prayers for relief against Phoenix, and even if Phoenix had had the status of a party against whom such adjudications could be made in a mortgage foreclosure suit, there could not, in this regard, have been Federal jurisdiction because of the lack of necessary diversity of citizenship as between the opposed parties.

In the case of *Thomas v. Brownsville etc. R. Co.,* 109 U. S. 522, cited by both petitioner (p. 96) and respondent (pp. 142, 155), there was a mortgage foreclosure suit brought by the Trustee under the indenture. The mortgagor was the original defendant. A decree of foreclosure was made and sale was had. At a later stage, stockholders of the mortgagor voluntarily petitioned for interven-

tion and were made parties defendant. These parties defendant thereupon filed an answer and *cross bill* praying that a certain construction contract on account of which the mortgage bonds were issued, the bonds so issued, and the mortgage securing the same, be avoided for fraud and the foreclosure decree vacated. The allegations of fraud in pursuance of the pleaded issues and prayer for relief were "proved beyond question" (p. 524). The court thereupon vacated the decree and dismissed the bill.

On appeal, the question was whether the trustee complainant should be permitted "to recover such a sum as the construction company actually earned in building the road" (p. 525) i. e., upon a *quantum meruit*. The Supreme Court pointed out that although the intervening stockholders "were not parties to the original suit" (p. 526), by permission they "were allowed to come in and contest the validity of the mortgage" (p. 526), and that by so doing and by filing their *cross bill* "they became actors" (p. 526). In this connection, this court said (p. 526):

> "In this condition of the case they are amenable to the rule that they who seek equity must do equity. It is just that they should pay a fair price for what they have received; that this mortgage, given for the construction of the road, though excessive by reason of the fraud in the contract, should stand for the reasonable value of what the company actually received in the way of construction. To permit these interveners to defeat the mortgage on any other terms would be unjust and would make the court the instrument of this injustice."

It will thus be seen that in the *Thomas* case, there was not presented the primary problem of the case *sub judice*, viz., the legal effect of a purported adjudication against

a bondholder in a foreclosure suit to which it was but a "formal" party, with respect to issues not involved in the *in rem* or *quasi in rem* proceeding of mortgage foreclosure. Furthermore, such issues as were decided were in pursuance of a *cross bill praying for the affirmative relief of cancellation.* Thereby an issue was framed to which the bondholder was an indispensable party and (so far as appears) Federal jurisdiction as to this issue existed.

However, the *Thomas* case does have relevancy in this case, particularly with respect to the right of Phoenix to obtain the reissuance to it of 517 shares of Bridge Company "A" stock which it had traded for bonds. In the Delaware Court of Chancery, Phoenix is seeking relief with respect thereto (see petitioner's brief, pp. 27-30). That being a matter concerning the internal affairs of a Delaware corporation, the Delaware Court only (and under no circumstances the Federal District Court in Iowa) has jurisdiction thereof (see petitioner's brief, pp. 80-83). The respondent has made no attempt to answer this section of petitioner's brief.

Under the doctrine of the *Thomas* case, petitioner contends however, that it is entitled to recover in courts of competent jurisdiction its entire advances to Bridge Company of $98,346 plus interest (petitioner's brief, pp. 43-44; Exhibit SC-114, R. 595-693) in addition to the said 517 shares of stock. *All the Delaware suits are brought in pursuance of this contention* and in prospect there is the $50,000 ($59,000) mortgage and note not yet in litigation.

With respect to Point III (respondent's brief, pp. 181-187), respondent has wholly failed to recognize the import of the admitted fact that it appeared generally in each Delaware case *and pleaded res adjudicata,* thereby volun-

tarily conferring upon the Delaware courts jurisdiction of the legal issue as to the effect of the Foreclosure Decree as an adjudication against Phoenix on the matters in suit in Delaware. *It was not until after the trial of the Delaware case reported in 14 Atl. (2d) 386, that respondent ran back to Iowa and filed the Supplemental and Ancillary proceeding to which certiorari is here directed.* In other words, the relief by virtue of the defense of *res adjudicata* may have been legally adequate, but to respondent it appeared that it would ultimately be unsatisfactory. Therefore the shift of position.

No reply appears necessary to respondent's answer (pp. 188-197) to petitioner's Point IV (pp. 86-88) and with respect to petitioner's point V (pp. 88-89), respondent (p. 197) has attempted no answer.

Point VI of petitioner's brief (pp. 90-95) serves to illustrate the two horns of a dilemma upon which respondent's case is impaled. Petitioner says, (1) that there was no adjudication against it in the Foreclosure Cause because of the absence of jurisdiction prerequisites with respect to the status of the parties and the issues as framed by the pleadings and prayers. Petitioner says, (2) that for there to have been an adjudication against Phoenix with respect to its underlying claims, notes, contracts and accounts, Phoenix must necessarily have been an indispensable party and that, if it had that status, the Federal Court had no jurisdiction of either parties or subject matter because of the lack of the necessary diversity of citizenship (Bridge Company and Phoenix being both Delaware corporations).

In respondent's brief (pp. 197-200), the petitioner's authorities are attempted to be distinguished because, says respondent (p. 199):

(a) It appeared in those cases that there was a substantial and indispensable interest held by a party not a party to the record, or

(b) The cases appeared to be those in which the introduction of an indispensable party, holding an interest in the lawsuit, ousted jurisdiction.

Both (a) and (b) are exactly the case sub judice. No one may properly question the "substantial and indispensable" character of Phoenix' interests. No one may properly question but that Phoenix was involuntarily impleaded as a party. Therefore, as to all issues except that of mortgage foreclosure, the court was without statutory jurisdiction. On the other hand, if Phoenix' status as such party was, as the court held, merely "formal," there was never any jurisdiction with respect to the parties and subject matter to support an adjudication.

B.

Respondent's Argument With Respect to Petitioner's Alternative or Secondary Contention.

(Points VII to IX; Petitioner's brief, pp. 96-105; Respondent's brief, pp. 200-208.)

If this court shall agree with petitioner's primary contention that the Foreclosure Decree was not a valid adjudication against Phoenix with respect to the issues raised by the Supplemental and Ancillary Bill, the result of a reversal in this respect will, of necessity, it seems, result in a decree dismissing the Supplemental and Ancillary Bill. In this situation, no injunctive or other relief whatsoever under the bill being proper, petitioner's alternative or secondary contention will have no application.

However, if the Supreme Court should disagree with petitioner's primary contention (but only in that event), petitioner takes the position that the maxim: "He who seeks equity must do Equity" and the particular application of that maxim, familiarly known as "Lord Redesdale's Rule," permits the "reopening" of the decree supporting the purported adjudication. Therefore, petitioner, as the defendant to a Supplemental and Ancillary Bill, not only to implement but also to enlarge the scope and effect of a former decree, should have been permitted to plead its defenses and to offer its evidence to establish that the former decree is not a "right" one.

Respondent's brief on this point (pp. 200-208) indicates that respondent has no proper understanding thereof. This is well illustrated by petitioner's attack (p. 200) upon petitioner's statement (p. 96) that the foreclosure decree was "wrong" because failing to recognize Phoenix' "*bona fide* claims." In this respect, respondent says (p. 200) that petitioner's contention is "in utter disregard of the fact that the Federal Courts have determined that they have no existence." Such statement wholly fails to give recognition to the doctrine of *Lawrence Mfg. Co. v. Janesville Cotton Mills, supra*, that "where a party returns to a Court of Chancery to obtain its aid in executing a former decree, *it is at the risk of opening up such decree.*"

Because the *Lawrence Mfg. Co.* case involved a *consent decree* in the original proceeding and because *Corpus Juris* cites some of the cases under the heading "Judgments by Agreement or Consent," Title "Judgments" (Respondent's brief, p. 201), respondent jumps to the unsupported conclusion that "Lord Redesdale's Rule" only applies where the decree sought to be implemented, enforced or enlarged

was the result of *consent or default* on the part of the original defendant.

Such is not the law and the cases impose no such limitation upon the principle. Respondent having cited *Corpus Juris* in aid of its apparent contention that the rule applies only to consent or default decrees, it is appropriate that petitioner should refer to the same work to show that it has no such limitation. In 21 C. J., Title "Equity," with relation to "Enforcement and Performance of Decrees" (Sec. 865, p. 692) by "Bill in Equity" (Sec. 867, p. 695), it is stated at p. 697 that a defendant in such a later suit or proceeding "*may ask that the entertainment of the application shall be subject to the condition that the justice of the decree as against him shall be considered.*" For this proposition are cited all of the cases appearing on petitioner's brief and many others including *Wadhams v. Gay*, 73 Ill. 415, where the court said (at p. 435):

> "We do not regard that it militates with the doctrine of the conclusive effect of what is *res adjudicata*, that where there is an incomplete decree, and it is ineffective for want of the provision of any means for its execution, and an application is made to a court of equity to supply the imperfection so as to render the decree effective, that then it is admissible to look at the real nature and character of the decree, as it may appear in the light of surrounding circumstances, for the purpose of determining whether there is such an equitable ground for action as will move a court of equity to interpose. Equity will penetrate beyond the covering of form, and look at the substance of a transaction, and treat it as it really and in essence is, however, it may seem."

The Circuit Court of Appeals recognized no limitation of the character mentioned by respondent in the case

below. In the opinion below, Circuit Judge Thomas said (115 Fed. (2d) at p. 11) that the rule "is applicable only in cases where a party is seeking to modify or enlarge an incomplete decree and then enforce it." Continuing, the Circuit Court said:

> "In such a case the entire cause may be re-examined to determine the existence of equitable grounds for relief." (Citing Federal cases.)

The Circuit Court denied the application of the rule because it said (p. 11) that here "The Bridge Company is not seeking to 'piece out' an incomplete decree and then enforce it." This was an entirely new and novel idea in the case, not briefed or argued by respondent below and appearing for the first time in the opinion of the court, *supra*. This was one of the principal grounds of petition for rehearing below (denied, R. 831), and in this Court has been the subject of a separate *reason* relied on for allowance of certiorari (petition for certiorari, p. 18, l), a separate *specification of error* (petitioner's brief, p. 58 (8)), and is the subject comprehensively argued in Point VIII of petitioner's brief (pp. 98-103).

Point VIII of respondent's brief, however, purporting to be an "Answer to petitioner's Point Eight" (pp. 205-208) on this point is wholly unintelligible and indicates that respondent either does not understand the question or has chosen to talk about irrelevant subjects for purposes of confusion and to avoid meeting this issue of law. Point VIII of respondent's brief bears no understandable relation to the corresponding point of petitioner's brief.

However, as pointed out under those headings of petitioner's brief entitled "The 'two-stage' Theory of the Parties" (pp. 14-17) and "The Non-Participation of Phoenix

at the Trial" (pp. 17-21) and in the "Reply to Respondent's Statement of the Case" herein, *the Foreclosure Decree was in substance a default decree against Phoenix Finance Corporation with exactly the same legal effect as though it had been a decree pro confesso.* Phoenix did not participate or offer evidence and all parties considered that this was the proper procedure at the first stage. This conformed to recognized Federal practice (see petitioner's brief—pp. 83-84).

Respondent does not answer or in any manner refer to Point IX of petitioner's brief (pp. 103-105). With respect thereto, petitioner in this reply brief has heretofore pointed out even more elaborately than in its principal brief, the circumstances of *intrinsic* fraud, misrepresentation and imposition in the Foreclosure Cause.

It is respectfully submitted that the decree below should be reversed so as to effect (a) a dismissal of the Supplemental and Ancillary Bill, or, in the alternative, (b) so as to require respondent, as complainant below, to show that the Foreclosure Decree was "right" and so as to permit petitioner, as defendant below, to show that a decree for the complainant below on the Supplemental and Ancillary Bill makes the court below a further "instrument of this injustice."

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IN THE

Supreme Court of the United States

October Term, 1941.

No. [redacted] 19

PHOENIX FINANCE CORPORATION, a Corporation of the State of Delaware,

Petitioner,

v.

IOWA-WISCONSIN BRIDGE COMPANY, a Corporation of the State of Delaware,

Respondent.

Petitioner's Reply to Respondent's Supplemental Brief.

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IN THE

Supreme Court of the United States.

No. 624. October Term, 1940.

PHOENIX FINANCE CORPORATION, A CORPORATION OF THE STATE OF DELAWARE,

Petitioner,

v.

IOWA-WISCONSIN BRIDGE COMPANY, A CORPORATION OF THE STATE OF DELAWARE,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S SUPPLEMENTAL BRIEF.

PRELIMINARY STATEMENT.

Although respondent has denominated its last document in this case as a "Supplemental Brief," the same is in fact an attempt to reply to petitioner's reply brief herein.

It is with great reluctance that petitioner files this reply to respondent's so-called "Supplemental Brief." It is realized that the Court has been and is being unnecessarily burdened with factual disputes not germane to the legal questions *sub judice.* Petitioner in its principal brief sought to avoid unnecessary extension of its argument in this respect.

Thus petitioner in its statement (Petitioner's Brief pp. 54-55) dealt with its secondary or alternative contention

that in a *supplemental* proceeding seeking *supplemental* relief of the character before the court, one of the *issues of fact* is whether the former decree was a "right" one. It was pointed out that the question before this court, however, is *one of law*, viz., whether the District Court should have permitted petitioner to present its defense in that respect and to offer evidence in support thereof. The petitioner recognized that the facts involved upon such a reopening of the case are not properly before this court, and with respect thereto petitioner said (Petitioner's Brief pp. 54-55):

> "A discussion as to what those facts are specifically and what detailed evidence is available to prove or disprove the same has no place on this writ of certiorari. *The point is that under 'Lord Redesdale's Rule,' the defendant in the Supplemental and Ancillary Cause should have been permitted to show that the decree of December 1, 1936 was not 'right.'*"

Respondent's brief, on the contrary, dealt with those facts as though the same were matters of principal importance for this court to pass upon. This of necessity forced petitioner, out of a proper regard for accuracy and justice to itself, to reply to factual statements by respondent demonstrably erroneous from the record.

To that reply, respondent has now by its "Supplemental Brief" attempted a rebuttal, and again petitioner finds itself faced with statements of fact by the respondent which, though not deemed material to the *legal issues* now before this court, cannot be permitted to pass unchallenged.

For purpose of emphasis, petitioner quotes the following from its Reply Brief (pp. 4-5):

"There are but the two following basic questions of law before the the Supreme Court:

(1) *Was the decree in the Foreclosure Cause such an adjudication against Phoenix Finance Corporation as to the issues in the several Delaware cases as to be entitled to 'full faith and credit?'*

(2) *Assuming such adjudication, was Phoenix Finance Corporation as the defendant in a Supplemental and Ancillary Bill to implement and enlarge that decree, entitled to challenge the same as 'wrong' under 'Lord Redesdale's Rule'?*

In the following (1) is referred to as Petitioner's 'primary' contention and (2) as Petitioner's 'alternative' or 'secondary' contention. All other questions discussed in petitioner's brief relate to integral parts of, or offshots from, these two fundamental questions. With respect to the alternative contention, *supra*, petitioner contends that it is entitled to challenge any purported finding of fact in the Foreclosure Cause which is not supported by competent evidence or is otherwise 'wrong.' Consequently, the petitioner with respect to the challenged findings in the Foreclosure Cause has stated what it earnestly and sincerely believes the facts to be and has given proper record references in support thereof. Furthermore the petitioner fortified its challenge in this respect by tenders of evidence (R. 192-223, 238, 250, 272-292). All such tenders were rejected by the Court (R. 223-224, 256, 257, 287, 288, 289, 290)."

FURTHER INACCURATE, INCOMPLETE OR MISLEADING STATEMENTS OF FACT AND INFERENCE IN RESPONDENT'S "SUPPLEMENTAL" BRIEF.

THE PARTICIPATION OF PHOENIX IN THE TRIAL OF THE FORECLOSURE CASE.

Respondent's supplemental brief (p. 4) charges the petitioner with "the repeated statement" that it "did not participate in the trial and did not request and instigate the foreclosure action * * * ." This is an obvious misstatement of petitioner's position and is not justified by anything appearing in either of petitioner's briefs. It is and at all times has been petitioner's earnest contention based upon the record, that it did not participate in any way in the trial of the Foreclosure Cause. On the other hand, in its principal brief (pp. 5-6), petitioner fully disclosed the facts with respect to its status as a bondholder holding more than 25% of the outstanding bonds, the provisions of the indenture with respect thereto, its request of the trustee for mortgage foreclosure and its agreement to secure and indemnify the trustee against costs and expenses in the proposed action.

References in the Master's Report.

On page 6 of respondent's supplemental brief, the respondent assails the statement by petitioner on page 31 of its reply brief, with respect to a finding by the Master, that "there is not a single record reference thus given by the Master which supports those findings." The attempted explanation of the respondent is that the Master's references have to do with the original depositions, transcripts,

books and exhibits in evidence and not to the pages of the printed record. However, the record has since been printed and is before this Court. If the respondent were being fair with the Court in its contention in this regard, it would have pointed out any comparable references from the *printed* record to corroborate the Master's references *if, in fact, any such references appear.* It is the petitioner's position that no record evidence exists to support the particular findings. Obviously the petitioner is not in a position to cite record references to prove the negative. Respondent, however, could readily establish the affirmative of its position in this regard *if any proper references appeared in the record.* The absence of any such citations is the strongest possible argument to support petitioner's position.

The $20,100 of bonds as collateral security for obligations originating with Phoenix Finance Corporation.

On page 8 of the respondent's supplemental brief, an attack is made upon petitioner's assertion on page 12 of its reply brief that no record references are given to support the statement of respondent that the $20,100 of Bridge Company bonds were given "as collateral security for the payment of obligations *originating with Phoenix Finance System, Inc.* * * *" Respondent's comments on this point indicate either a failure to grasp the point intended or, as is suspected, a specious pretense to induce further confusion. As pointed out by petitioner (petitioner's reply brief p. 12), these bonds were issued to Phoenix Finance Corporation as collateral security only for obligations *originating solely with Phoenix Finance Corporation* (F. R. 542, 1028). None of the references either in the respondent's

original brief or in the second paragraph on page 8 of the supplemental brief have any bearing directly or indirectly upon the factual issue thus disputed.

John A. Thompson, a witness in the Foreclosure Cause on behalf of the intervener, the Respondent, the Trustees-Complainants, but not for Phoenix (petitioner).

F. R. 538 cited by the respondent in its supplemental brief at p. 9 shows that John A. Thompson was called for direct examination by Rex H. Fowler. F. R. 531, also cited by the respondent on the same page, discloses the appearances at that particular hearing and indicates that C. S. Bradshaw and Rex H. Fowler of Des Moines appeared as attorneys for the complainants-trustees, First Trust & Savings Bank and A. H. Schubert. At F. R. 414 *et seq.*, John A. Thompson gave a deposition as a witness called on behalf of Fayette D. Kendrick, Intervener. As heretofore pointed out, this deposition was never offered in evidence and is in the record for a limited purpose only (petitioner's Reply Brief pp. 22-23). Mr. Thompson was cross-examined as an intervener's witness by respondent's counsel (F. R. 562 *et seq.*, F. R. 633). At another point, Mr. Thompson was called as a witness on behalf of the respondent (F. R. 651). At F. R. 673 and F. R. 691, Mr. Thompson was called for cross-examination by counsel for the intervener.

The position the petitioner has consistently taken is that Mr. Thompson at no time testified as a witness on behalf of Phoenix Finance Corporation nor did Phoenix Finance Corporation offer any evidence of any character in the trial of the Foreclosure Cause. At pp. 9 and 10 of respondent's supplemental brief, the obvious interference is that Mr. Thompson was a witness for petitioner and that

petitioner, therefore, participated in the trial. As heretofore pointed out, (Petitioner's Brief pp. 17-21) such is not the fact.[1]

The Alleged Non-production of Books and Records by Phoenix Finance Corporation.

Respondent in its Supplemental Brief at pages 9, 10, 27 and 29 persists in a studied effort to support its erroneous and deliberately misleading contention that petitioner disobeyed some court order in the Foreclosure Cause to produce books. This matter has been dealt with comprehensively in Petitioner's Brief at pages 46-52 and in Petitioner's Reply Brief at pages 14-18. Nowhere in Respondent's principal or Supplemental Brief has Respondent been fair enough to concede the unassailable fact that the only order involved is that of April 24, 1934 (F. R. 98) which directed *Phoenix Finance Corporation* to produce certain of *its books at its office in Des Moines, Iowa, within ten days from the date of said order.* No other order was made and no formal demand for the production of Phoenix Finance Corporation's books with or without supporting order was made at any time during the trial of the Foreclosure Cause (no record reference to prove the contrary).[2]

[1] The tacit recognition by respondent of petitioner's non-participation as an actual party is also evidenced by its motion to strike Phoenix's petition for modification of the decree in the Foreclosure Cause (F. R. 392) on the ground, *inter alia*, that "Phoenix Finance Corporation is represented in this case by the * * * trustees, who are indispensable parties in charge of the litigation, and said Phoenix Finance Corporation is not entitled to file a separate petition for rehearing."

[2] At page 147 of the transcript of hearing before the Master at Des Moines commencing July 15, 1935, the Master with respect to certain books of Phoenix Finance System, Inc., and Phoenix Finance Corporation said:

After Phoenix Finance Corporation had been fully exonerated on one charge of the same character (F. R. 106) on January 5, 1935 (F. R. 108, 109), the case proceeded to hearing before the Master in July, 1935 (F. R. 115), followed on March 10, 1936 (F. R. 138) by the Master's findings and conclusions, on June 13, 1936, by hearings on exceptions before the District Court (F. R. 203), and culminating in the decree of December 1, 1936 (F. R. 202). After December 4, 1934, when the charge was originally made (F. R. 106), no formal accusations calling for a denial were again made by the respondent until its answer to the petition for rehearing (at F. R. 397) filed February 18, 1937 (F. R. 410). The hearing on petition for rehearing and the answer, resistance and motions with respect thereto was on *the same day* (F. R. 412). *The fact is that the 23-page answer containing the charge was actually filed at the*

"*The Special Master:* As the record now stands there is nothing for the Master to require the production of books."

Throughout this transcript, references are made to books and records both of Phoenix Finance System, Inc. and Phoenix Finance Corporation without any demand of counsel for their production, any request for any order to require production or any complaint as to non-production in pursuance of any order (see particularly Des Moines transcript pp. 301-302). At the Mason City, Iowa, hearings before the Master commencing July 22, 1935, similar references appear. It is significant that counsel made no effort to enforce production of books before the Master if, as contended, an order had been made and violated. It is equally significant, as pointed out in petitioner's principal brief (p. 50), that on January 5, 1935, the District Court overruled intervener's motion to strike petitioner's answer because of the alleged wilful disobedience and refusal of petitioner "to comply with the rules and order of this court for the production of books and papers * * *." (F. R. 106, 108.)

hearing and petitioner had no opportunity even to read the same until thereafter.

No evidence was produced by respondent to support this allegation. The trial court (Judge Scott) in denying the petition for rehearing (F. R. 412) apparently seized upon this unproved allegation *as a proven fact, entirely overlooking the scope of Judge Molyneaux's order of April 24, 1934, and the utter lack of any evidence to indicate noncompliance therewith by Phoenix Finance Corporation.* Evidence of confusion in the mind of the trial Judge, the Hon. George C. Scott, as to the scope and limitations of the order is to be found in the opinion denying petition for rehearing, wherein it is stated that "The interveners obtained an order of Court for the production of the books and records of the Phoenix Finance Corporation *before the Master* * * *" (F. R. 413). No such order was ever made.

At p. 27 of Respondent's Supplemental Brief, the absurd statement is made that "Petitioner had full opportunity to present anything it wanted to with respect to this pretended claim [i. e., its contention that it *did* produce books as ordered] on the *original hearing.*" How Phoenix Finance Corporation might be expected to prove its innocence of sin during a period when there was neither sin nor the charge of sin is not made clear. The *original hearing* to which reference is made was in July, 1935 (F. R. 115), after petitioner's previous exoneration on a charge of similar import (F. R. 106, 108, 109). The accusation was not again made until February 18, 1937, when respondent filed its answer to the petition for rehearing (F. R. 397-410) at the hearing held on the same day (F. R. 412).

The petitioner at all times since the damaging effect of this deception became apparent has nevertheless en-

deavored to prove *affirmatively* its full compliance with the order of April 24, 1934, although the burden of that issue was obviously upon the respondent and has never been met. At the trial of the supplemental and ancillary cause, petitioner sought, in support of its defense that the decree in the Foreclosure Cause was not a "right" one, to offer testimony to establish its position in this regard. The following is quoted from the Record (R. 275-277):

> "Mr. Morford: I would like to call John A. Thompson as a witness and have him sworn in this case.
>
> The Court: For what purpose?
>
> Mr. Morford: In connection with Mr. Thompson's testimony I desire to show the following: In the first place I wish to——
>
> The Court: You may state briefly the character of the testimony you desire to offer without going into a recitation of the testimony.
>
> Mr. Morford: In the first place I desire to make formal tender through John A. Thompson of all of the facts contained in the schedule of the testimony of John A. Thompson filed as an exhibit and schedule to the resistance of Phoenix Finance Corporation in this cause. With respect to those facts Your Honor refused Phoenix Finance Corporation the privilege of taking Mr. Thompson's deposition. We desire to offer his evidence with respect to those same facts, and all of those same facts, each and every part of his schedule of testimony.
>
> In addition we desire to offer the testimony of John A. Thompson to show that Phoenix Finance Corporation at all times complied with the order of Judge Molyneaux entered in this cause under date of April 24, 1934, and appearing in the printed record on pages 97 and 98, which order reads as follows: and I quote:

> 'Ordered that the defendant Phoenix Finance Corporation produce at its office in Des Moines, Iowa, all its books and records appertaining to the business and affairs of Iowa-Wisconsin Bridge Company, within ten days from the date of this order, and submit them to the inspection of the intervener and his counsel and accountant.'

In Your Honor's opinion dated March 4, 1937, as the same appears in the printed record, pages 410 to 413, Your Honor stated, and I quote:

> 'The interveners obtained an order of court for the production of the books and records——'

The Court: I don't think that we should take the time to read these matters into the record. You have sufficiently identified the subject upon which you desire to offer the testimony I would think.

Mr. Morford: Yes. In connection with that I can merely add that in view of the fact that Your Honor denied the petition for rehearing upon that ground we believe that we are entitled to show that there was at all times full and complete compliance by Phoenix Finance Corporation with the order of this court, and that assertion of fact which must have been taken by Your Honor from the various briefs and oral arguments of counsel, is not in accordance with the fact, and is not supported by the record. In other words, I do not want to take the position or have Your Honor think I am taking the position that I am saying Your Honor was wrong in a certain finding and therefore you should correct it. That is not my point. I say Your Honor made a certain finding of fact, and there is nothing in the record to support that finding of fact, and that the fact is the contrary, that Your Honor was imposed upon by fraud and misrepresentation on the part of counsel. We desire to direct Your Honor's attention to that fraud and to that end offer testimony to show that fact."

The Court would not permit the swearing of petitioner's witnesses (R. 258), and denied (R. 287) this and other offers of evidence by petitioner. Does this tender of sworn testimony indicate that petitioner is apprehensive of "running the risk of subjecting one of its officers to the charge of perjury" as respondent gratuitously suggests on p. 10 of its Supplemental Brief?

All of Respondent's references are either to the books of companies other than Phoenix Finance Corporation, for the production of which no order of any character was made at any time, or relate to requests for books made informally during the taking of evidence, without specific demand or court order and at times and places not comprehended in the order of April 24, 1934, or relate to similar informal requests made of witnesses who did not have the custody or control of the documents apparently desired.

This entire point is obviously featured by the respondent for the purpose of prejudicing petitioner. When the record is analyzed, it appears undisputably that *Phoenix Finance System, Inc.*, moved its general offices from Des Moines, Iowa, to Cleveland, Ohio, in 1929, and from thence to Florida in February, 1930 (F. R. 415, 613), where it went out of business in 1932 (F. R. 419). From the beginning and throughout this controversy, *Phoenix Finance Corporation* had its general offices and the office of its President, John A. Thompson, and its Secretary, M. K. Thompson, where the books were kept, in St. Petersburg, Florida (F. R. 545, 615, 636). It also had a loan office in Des Moines as well as in Minneapolis, Milwaukee (F. R. 440), and other cities. Therefore, when *Phoenix Finance Corporation was* ordered to produce *its books* at *its* office in Des Moines *during the ten day period* after April 24, 1934, it had to bring

its books from Florida to Iowa for that purpose. After being kept at the Des Moines office for a considerable period beyond that required by the order and being available throughout that period for any proper inspection by counsel for intervener, they were, no doubt, returned to the general offices in St. Petersburg, Florida. On the other hand, the books of *Phoenix Finance System, Inc.*, were at all times after the commencement of this action in Florida and were never ordered to be produced. Mr. English, the Vice-President at the Des Moines loan office of Phoenix Finance Corporation, obviously had nothing to do at any time with the general books either of Phoenix Finance Corporation or of Phoenix Finance System, Inc. (F. R. 613-616).

We have deemed it necessary to labor this point, perhaps at unnecessary length, because of the unjustifiable insinuations of respondent that Mr. Thompson in some manner and for some undisclosed purpose absconded with the books from Iowa to Florida in order to avoid compliance with the very limited order of April 24, 1934. *In conclusion, on this point it is significant that respondent does not contend and has made no assertion in any brief or argument that its counsel ever called at the offices of Phoenix Finance Corporation in Des Moines, Iowa, as provided in this order either between April 24 and May 4, 1934, or at any other time, and was refused access to any books of Phoenix Finance Corporation or was told that such books were not there.*

The fact findings in the Foreclosure Cause.

On pages 11 and 12 of Respondent's Supplemental Brief, petitioner is assailed for pointing to a finding with respect to the consideration for the underlying $50,000

mortgage as evidence of "successful legerdemain by counsel for respondent * * * without supporting evidence." Continuing, Respondent says (Supplemental Brief p. 12):

> "To say that in each case counsel for respondent secured a favorable decision without evidence and by sleight of hand is certainly impertinent and verges on contempt. If this assertion deserves notice by this Court, we cite the following record references:" (citing alleged references).

The petitioner reiterates that the references there cited do not support the finding, and such assertion is made with all solemnity and sincerity and with due deference to any thought to the contrary held by the Master, the District Court or by opposing counsel.

However, here again the Respondent evidences an utter lack of appreciation for petitioner's secondary or alternative position (Petitioner's Reply Brief pp. 4-5). The question, in this phase of the case, is not whether the record in the Foreclosure Cause supports the findings or any of them, but rather whether petitioner as the defendant below to a supplemental and ancillary bill of complaint to implement a judicial decree may defend against that decree as "wrong" by reason of the principle announced by this Court in *Lawrence Mfg. Co. v. Janesville Cotton Mills*, 138 U. S. 552 at 561, that "*where a party returns to a Court of Chancery to obtain its aid in executing a former decree, it is at the risk of opening up that decree.*"

The Issue is One of Law and Not of Fact.

On p. 14 of Respondent's Supplemental Brief, Respondent refers to *findings of fact* by the District Court below that "all of the matters and items involved in the Delaware

actions and in the mortgage were involved in, fully litigated and determined" in the Foreclosure Cause, and that "unless petitioner was restrained by the court, the respondent (defendant) would be deprived of the fruits and advantages of the judgment, decrees and orders of the Court in this cause" and other supposed *fact findings* of similar import. With respect thereto, respondent says (p. 15):

> "The petitioner has wholly failed to show that any of such findings of the trial court are not supported by the record nor that the fact statements contained in the opinion of the Circuit Court of Appeals affirming the decree of permanent injunction are not fully supported by the record • • •."

The petitioner has felt throughout that respondent has wholly failed to comprehend the legal questions before this court. The foregoing makes that impression a certainty. Such findings are not *fact findings* but *conclusions of law*, and constitute the primary *legal* question in this Court. Petitioner's first Specification of Error is as follows (Petition for Writ of Certiorari p. 23):

> "1. That the Circuit Court of Appeals for the Eighth Circuit erred in holding that the decree of December 1, 1936 in the Foreclosure Cause constituted an adjudication against Phoenix Finance Corporation of the several issues and controversies in the Supplemental and Ancillary Cause."

The first *question of law* presented to this Court is stated in the following language (Petition for Writ of Certiorari p. 12):

> "1. Whether or not the decree of December 1, 1936 in the Foreclosure Cause constitutes an adjudication against Phoenix Finance Corporation of the several issues and controversies involved in the Supplemental

and Ancillary Proceedings, to wit, the five pending Delaware lawsuits, the $50,000 mortgage of record in Allamakee County, Iowa, and Crawford County, Wisconsin, and the $50,000 note for which the same is security."

Point II of Petitioner's Argument (Petitioner's Brief pp. 66-84) deals entirely with this question as one of law, and in Petitioner's Reply Brief (p. 4), the two basic questions are restated as follows:

(1) *Was the decree in the Foreclosure Cause such an adjudication against Phoenix Finance Corporation as to the issues in the several Delaware cases as to be entitled to "full faith and credit"?*

(2) *Assuming such adjudication, was Phoenix Finance Corporation as the defendant in a Supplemental and Ancillary Bill to implement and enlarge that decree, entitled to challenge the same as "wrong" under "Lord Redesdale's Rule"?*

It is inconceivable that the District Court or the Circuit Court of Appeals may decide a basic question of law and denominate it as a *finding of fact* in such manner as to deprive a petitioner of a review of that legal question in this Court.

The Issues in the Foreclosure Cause and Petitioner's Status Therein.

On p. 17 of Respondent's Supplemental Brief, it is stated that "All the claimed underlying considerations of Phoenix for bonds held by it (now involved in the Delaware actions and in the mortgage) *were put forward by the petitioner as claimed considerations for such bonds,* placed

in issue and investigated and litigated to the minutest detail and to the fullest extent * * *."

No statement could be further from a true appraisal of the facts. *Petitioner (Phoenix Finance Corporation) put nothing forward* and there were no issues as to it on any of these questions (see Petitioner's Brief pp. 10-14, 17-21, 66-83). In no event was it a party against whom an adjudication entitled to faith and credit could be made.

The Non-participation of Petitioner at the Foreclosure Trial.

In Respondent's Supplemental Brief at p. 29, it is stated that at a hearing in the Foreclosure Cause "intervener's counsel stated very pointedly, and in terms that could not be misunderstood, that the whole case was being tried and submitted." (Citing F. R. 694-695.) *However, the same record shows that Phoenix Finance Corporation (this petitioner) was not present at the hearing.* (See also F. R. 122.)

Continuing, Respondent says (p. 29) that "There was nothing to prevent the petitioner from bringing its books and the books of its predecessor and placing them in evidence, except its own unwillingness to do so." This assertion does not bear scrutiny when considered in the light of the facts stated in Petitioner's Brief under the heading "The 'Two-Stage' Theory of the Parties" (pp. 14-17), and the heading "The Non-Participation of Phoenix at the Trial" (pp. 17-21). The facts there given have never been successfully rebutted or contradicted.

Delaware Trials No Burden on Respondent.

Respondent's Supplemental Brief at p. 33 contains the argument that "To present this voluminous record in the

Delaware cases * * * would involve enormous expense * * *." No such burden has been apparent thus far. One case has been tried and determined (*Phoenix Finance Corporation v. Iowa-Wisconsin Bridge Company*, 14 Atl. (2d) 386), and is pending on appeal (see Appendix to Petitioner's Brief). All the other cases would involve precisely the same record. Furthermore, although as pointed out (p. 33), a trial in Delaware is "over 1,000 miles away from where the Bridge Company's business and properties are located," nevertheless *Delaware is the voluntarily chosen domicile of the Respondent* and the place of its legal principal place of business.

The Alleged Control of Bridge Company by the So-called Phoenix Group.

This aspect of the matter (although conceived to be here immaterial) was stressed by petitioner in its Reply Brief (pp. 27-43) because of the persistent emphasis based upon incorrect facts appearing in Respondent's Brief. Again, in Respondent's Supplemental Brief (Appendix, pp. 47-53) appear statements of fact and implications that are wholly unwarranted from a consideration of the record. As to such facts, petitioner feels constrained to show this Court (if it be deemed pertinent) the true facts with the appropriate (and correct) record references. The following page numbers refer to statements in Respondent's Supplemental Brief:

(p. 47) Respondent states that in October and November, 1930, "the number of directors of the Bridge Company was increased and Thompson, *together with other directors in the Phoenix Finance System, Inc.*, became directors of the Bridge Company. From that time on, Thompson controlled the Bridge Company." This meeting was on November 1,

1930 (F. R. 861). Of the eleven directors (four of whom were elected at this meeting (F. R. 862)), *only J. A. Thompson and A. B. Wilder* were directors of Phoenix Finance System, Inc., or in any way connected with that Company. Wagner had no such connection (F. R. 265, 279, 290, 368, 674). Neither had Edward O'Conner (F. R. 265, 279, 343, 339, 368).

(pp. 47, 48) Respondent states that the November 11, 1930 meeting "was controlled by John A. Thompson and *his associates,* John W. Shaffer and Vernon W. O'Conner." F. R. 865-871, cited by respondent, shows conclusively that John A. Thompson did not control the meeting, did not vote and took no other part except to preside as chairman of the meeting. Furthermore, the cited record does not contain a scintilla of evidence that either John W. Shaffer or Vernon W. O'Conner were "associates" of Thompson, nor is there any other evidence in the record to establish such fact. Furthermore, this was an annual meeting of stockholders held in pursuance of notice to *all* stockholders (F. R. 865-871).

(p. 48) The first two grammatical paragraphs on this page can serve no purpose except to confuse the court. Respondent has attempted no refutation of the facts with respect to the November 26, 1930 meeting stated on pp. 34 and 35 of Petitioner's Reply Brief. *It remains undisputed that the so-called Phoenix group did not at the time of any meeting own a majority of the outstanding voting stock of the Bridge Company* (Petitioner's Reply Brief p. 32).

(p. 48) At the March 10, 1931 annual meeting of stockholders, held pursuant to notice to *all* stockholders (F. R. 893, there were outstanding and entitled to vote 3,651

shares (F. R. 311). Therefore, the 1,310 shares voted by Thompson did not represent corporate control.

(p. 49) Respondent persists in the characterization of Thorson as "a Thompson director" in spite of the conclusive record evidence to the contrary referred to at p. 37 *et seq.* of Petitioner's Reply Brief. Respondent's record references do not support the contention of respondent.

(p. 50) Again respondent insinuates that H. T. Wagner was an associate of John A. Thompson. As above shown, this is an unfair and incorrect implication (F. R. 265, 279, 290, 368, 674). F. R. 986-999 cited by respondent do not bear out the assertion that any of the persons named were "Thompson controlled directors." *Furthermore, the election of directors at the March 8, 1932 stockholders' meeting was the unanimous action of all stockholders present* (F. R. 998).

(pp. 50-51) Respondent says that a board of directors of Bridge Company "was selected by John A. Thompson at a stockholders' meeting held on July 8, 1933." This is utterly and deliberately false as counsel for respondent well knows (being himself present at the meeting; F. R. 1039). At this meeting, it appears that all the persons characterized by the respondent as "Thompson controlled directors" were defeated by a vote of 26 votes to 1,440 votes for the winning ticket, and 412 votes for a third ticket (F. R. 1041). J. A. Thompson ceased to be President after this meeting (F. R. 538). Furthermore, respondent's present contention as above quoted is opposed by the allegations contained in its answer to the bill for foreclosure, wherein this respondent stated and verified that (F. R. 65) —

"Par. 11. That the management of defendant corporation set out in Par. 9, by directors who were interested in the Phoenix Finance System, Inc. or its subsidiary organizations, remained on said board of directors *until the annual meeting held on the 8th day of July, 1933, when its present board of directors was elected; that* said corporation is now being operated at the lowest expense and cost it has operated at any time since the beginning of its operations; that an effort is being made by its present officers to re-finance outstanding accounts; that due to the fact these directors are stockholders and are interested in the organization they perhaps make a greater effort to refinance said organization than would some disinterested persons." (emphasis supplied)

(p. 52) The reference to A. M. Nystrom is inexplainable except for purpose of confusion in view of the fact that Mr. Nystrom never served as a director by participating in any meeting (Petitioner's Reply Brief, p. 40).

(pp. 52, 53) The statement that cancellation of $2,000 of the Wagner stock subscription was charged to "Expense—Cost of Bridge" is wholly untrue. This item, as shown by F. R. 1193, 1042, was charged to "Stocks and Bonds." The statement is made by respondent for the obvious purpose of reflecting upon Mr. Wagner and the then Bridge Company management. Furthermore, this stock subscription cancellation was in line with the policy of the Bridge Company at that time as evidenced by similar cancellations in other cases (particularly F. R. 1030).

REPLY TO RESPONDENT'S SUPPLEMENTAL ARGUMENT.

This case was assigned for reargument on May 26, 1941 (312 U. S. 670) following the affirmance by an equally divided court of the case of *Toucey v. New York Life Insurance Company* on April 7, 1941 (85 L. Ed. 745)[3] and the granting of rehearing thereon on April 28, 1941 (85 L. Ed. 846). The fact that the instant case was assigned both for argument and reargument *immediately following the Toucey* case lends support to the idea that comparable legal issues are thought by this Court to be common to both cases.

To the very limited extent involving a general consideration of the application of Section 265 of the Judicial Code, this is true. In both cases there were injunctional orders *against the party* to a state court action, and, as pointed out in Petitioner's Brief at p. 87, this offends against the Section to the same extent as an injunction formally directed against the state court itself.

> *Oklahoma Packing Company v. Oklahoma Gas & Electric Co.*, 309 U. S. 4.

Then too, in both cases the state court actions seek no relief "affecting the control, possession or disposition of the *res*."

> *Guardian Trust Co. v. Kansas City Southern Railway Co.* (C. C. A. 8), 171 Fed. 43, 50;
> *Equitable Life Assr. Society v. Wert*, 102 F. (2d) 10, 14.

However, in *Toucey v. New York Life Insurance Company* (C. C. A. 8), 102 F. (2d) 16, it appeared that *Mr.*

[3] No official report.

Toucey was the complainant in a Federal equity suit seeking as primary relief the reformation of a written instrument (p. 21). The reformation thus sought was predicated upon the alleged fraud of the defendant. If reformation had been granted, the complainant as necessary incidental relief would have been entitled to a money judgment for accrued disability benefits on the reformed instrument. The issue of fraud was litigated and decided adversely to Mr. Toucey.

Mr. Toucey (ignoring the colorable assignment to Shay) then commenced a state court action at law on the instrument *in the form it would have been had the Federal Court granted reformation.* That action was enjoined by the Federal Court in a supplemental proceeding on the ground that the adjudication against Toucey, the indispensable party complainant in the Federal equity suit, on the issue presented by the complainant in that suit, viz., the issue of fraud in the reduction in the amount of a policy of insurance, was binding upon the *same party* when he sought to litigate the *same issue* in a state court *against the same defendant.* In such cases, said the Court (p. 23), the Federal courts have "The power and duty * * * to effectuate their decrees and judgments and protect the fruits thereof * * *."

The distinction between the *Toucey* case and the case *sub judice* is apparent. As stated in Petitioner's Brief at pp. 87, 88—

> "The sole question here is: To what 'fruits or advantages' is the Bridge Company entitled? What rights were secured and what burdens were imposed by the final decree of December 1, 1936, in the Foreclosure Cause? Could an action *in rem* to impose a specific lien

on specific property bear fruits *in personam* beyond the issues and the parties indispensably in court? Did the Bridge Company litigate its indebtedness in a foreclosure suit in which its creditors were not indispensable parties? Did the 'fruits and advantages' of the decree in that suit, brought to establish a specific lien on specific bridge properties, by trustees who 'had exclusive control of the litigation' comprehend the stripping of Phoenix of its choses in action which were not a part of the *trust res*, and which the trustees did not hold, represent or control?"

However, in the *Toucey* case, the Eighth Circuit Court of Appeals, as a necessary part of the *ratio decidendi*, stated principles of law fully applicable to the facts of the instant case but not, for the reasons pointed out, applicable to the facts of the case there under consideration. Thus the Court in the *Toucey* case said (p. 19):

"It is well settled that 'where a bill states a case entitling the complainant to equitable relief, if the proof fails to establish the averments of the bill in that respect, the court is without jurisdiction to proceed further and determine rights that are cognizable in a court of law.' 21 C. J. 142. It is also the rule 'that where a cause of action cognizable at law is entertained in equity on the ground of some equitable relief sought by the bill, which it turns out cannot, for defect of proof or other reason, be granted, the court is without jurisdiction to proceed further, and should dismiss the bill without prejudice." (citing authorities)

The illustration of the rule is where it is made to appear in an equity suit brought to foreclose a mortgage or other lien that there is in fact no valid lien enforceable in equity. In such cases, the equity court may not proceed to adjudicate a claim of legal liability upon

> *a promissory note or upon a purely legal obligation unrelated to equitable liens. In such cases, the legal controversy presented is dependent and distinct.''* (citing authorities; emphasis supplied)

The petitioner has carefully reviewed all additional authorities cited by respondent in its Supplemental Brief and has arrived at the considered opinion that this Court will not be aided by further analyses of cases or further discussions of legal abstractions. In nearly all instances the principles quoted by respondent cannot be controverted *when applied to their particular facts.*

It is respectfully submitted that the respondent has not answered petitioner's basic arguments or indicated any real appreciation of the facts of this case or the law as applied to those facts. Thus, as to petitioner's *primary* contention, respondent ignores the undisputed facts and applicable law (a) that the Foreclosure Cause was a proceeding *in rem* or *quasi in rem;* (b) that petitioner was *not* an "indispensable" party to that cause; (c) that the "representation" of petitioner by the Trustees-Complainants was limited of necessity to matters "relating to their common interest in the trust property," i. e., the enforcement of a lien upon real estate; (d) that there were no pleaded or justiciable issues in the Foreclosure Cause involving the underlying legal obligations of respondent to petitioner or any set-offs or legal counterclaims of respondent against petitioner; (e) that there was no prayer in the Foreclosure Cause justifying a decree of the scope and effect here claimed (*Federal Land Bank v. Jefferson,* Iowa 1941, 295 N. W. 855); (f) that as to the controversy involving 517 shares of Bridge Company preferred stock, the redelivery of which Phoenix is seeking in the Delaware Court of Chan-

cery, that Court has exclusive jurisdiction thereof as a matter involving the internal affairs of a Delaware corporation;[4] and, finally, (g) that the decree in the Foreclosure Cause was in legal effect (responsively to the pleadings and prayers) simply *a decree denying mortgage foreclosure.*

As to petitioner's *secondary* or *alternative* contention (the application to this case of the principle of "Lord Redesdale's Rule), the respondent fails to recognize that in such a case as this the equitable principles applicable to petitions for rehearing or the legal principles applicable to motions for new trial are not in point; that the foreclosure decree was in fact "complete and perfect" so far as concerns its sole and proper purpose, *the denial of foreclosure;* that as such it was self-executing and therefore incapable of further implementation; that the events happening after that decree, i. e., the institution of the Delaware actions and the recording of the $50,000 mortgage, were the basis of a *supplemental* bill seeking *supplemental* relief (Petitioner's Brief p. 101); and that in such case, the respondent having returned to the Court "to obtain its aid in executing a former decree," it was "at the risk of opening up such decree." Furthermore, at the expense of repetition but for the purpose of emphasis, it is again stated by petitioner that one of the points before this Court is petitioner's *right* on such a supplemental bill to challenge the former decree as *wrong.* What ultimate facts will appear is of no moment at this time.

> *"The point is that under 'Lord Redesdale's Rule' the defendant in the Supplemental and Ancillary Cause*

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[4] At no point in respondent's several briefs has any answering argument to this contention been made (see Petitioner's Brief pp. 80-84).

should have been permitted to show that the decree of December 1, 1936, was not 'right' ".[5]

The Court is advised that the decision of the Supreme Court of Delaware in *Iowa-Wisconsin Bridge Company v. Phoenix Finance Corporation,* No. 4 October Term 1940,[6] is still pending. In the event of a decision prior to the determination of this case, the petitioner will supply this Court with properly authenticated copies thereof.

It is respectfully submitted that the decree below be reversed.

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ZIMMERMAN & NORMAN,
CASPER SCHENK,
Of Counsel.

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[5] From Petitioner's Brief pp. 54-55.
[6] In Superior Court, 14 Atl. (2d) 386; see Appendix, Petitioner's Brief.

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IN THE

Supreme Court of the United States

October Term, 1941.

No. 19.

PHOENIX FINANCE CORPORATION, a Corporation of the State of Delaware,

Petitioner,

v.

IOWA-WISCONSIN BRIDGE COMPANY, a Corporation of the State of Delaware.

Respondent.

Supplemental Brief of Petitioner on Section 265 of the Federal Judicial Code.

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IN THE

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No. 19. October Term, 1941.

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Petitioner,

v.

IOWA-WISCONSIN BRIDGE COMPANY, A CORPORATION OF THE STATE OF DELAWARE,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER ON SECTION 265 OF THE FEDERAL JUDICIAL CODE.

HISTORICAL BACKGROUND.

At the conclusion of reargument, counsel were requested to submit additional briefs on the historical development of Section 265 of the Judicial Code and a review of prior decisions of the court with respect thereto. The Section provides that:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law, relating to proceedings in bankruptcy." (*36 Stat. 1162; 28 U. S. C. 379.*)

There is nothing to be gained by a mere digesting of each case which has been before this court, as there is no

way to reconcile the various and apparently conflicting results reached by the court in the many cases arising under the Section. Sometimes the mandate of the statute has been rigidly enforced, other times explained away, and in a few instances ignored. In fact, it has been said that the apparent result of prior judicial interpretation is that the statute is not to be read as it was drafted, but as follows:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy, *except where a suit is first filed in a federal court and afterwards in a state court, or where such injunction is necessary, in aid of jurisdiction already acquired by the federal court.*" [1]

It is the position of petitioner that such amendment and emasculation of the clear and unambiguous language of Section 265 by judicial construction is untenable and that the court should reconsider the subject and if necessary restore the effect of this Section as clearly intended by the Congress.

In view of the political background behind the adoption by Congress of the Act of 1793 (Section 265 of the Judicial Code minus the bankruptcy exception), it is clear that Congress meant precisely what it said, namely, that no injunction should be granted to stay any proceedings in state courts.[2]

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[1] *43 Harvard Law Review 345 (369).*

[2] Federal Injunction against Proceedings in State Courts: the Life History of a Statute, *Volume 30, Michigan Law Review, page 1145. Edgar Noble Durfee, Robert L. Sloss.*

As stated by Mr. Charles Warren:

> "This provision was undoubtedly made in consequence of a report by Attorney General Edmund Randolph to the House of Representatives, December 27, 1790, as to desirable changes in the judiciary act of 1789 in which he recommended that the act provide that 'No injunction in equity shall be granted by a district court to a judgment at law of a state court.' "

Mr. Warren further states that the restriction in the statute

> "' * * * was a significant illustration of the strong apprehension felt by early Congresses at the danger of the encroachment by federal courts on state jurisdiction, * * *"[3]

Federal and State Court Interference, 43 Harvard Law Review 345 (347).

Despite the judicial distinctions drawn over the past one hundred and forty-eight years, it is submitted that this Court has adopted a policy of limiting the authority of the lower federal courts over matters primarily of state concern, and in effect, has returned to the judicial theory of the founders of the Republic. See *Railroad Commissioners of Texas, et al. v. Pullman Co.*, 312 U. S. 496, 61 Supr. Ct. 643, 85 L. Ed. 580.

It is significant that in 1793, the Third Congress was framing the eleventh amendment to the Federal Constitution which granted to the states the privilege of immunity

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[3] "Although not lacking in forerunners, the *Pullman* case may prove to be a landmark on the road toward a reshaping of the business of the federal courts along more appropriate lines." The Pullman Case: A Limitation on the Business of the Federal Courts, *53 Harvard Law Review 1379 (1381)*.

from suit in the federal courts. In fact, the preceding ten amendments to the Federal Constitution were all restrictive in character, five of them being directed toward the judiciary. The question of states' rights was paramount in the minds of the majority of the members of Congress.

JUDICIAL INTERPRETATION OF THE STATUTE OF 1793.

(a) *In General.*

The statute of 1793 was first before the Supreme Court in the case of *Diggs & Keith v. Wolcott*, 4 Cranch 179, 2 L. Ed. 587 (1807). In reversing a decree of a Federal Circuit Court enjoining an action in a state court of Connecticut, the court stated that:

> "a Circuit Court of the United States had not jurisdiction to enjoin proceedings in a state court."

The decision is unequivocal and it would seem necessarily to follow that an injunction against proceedings in a state court may not be granted by a federal court in any case, except to the extent that the statute might be limited by the provision of the Federal Constitution vesting original jurisdiction in the Supreme Court, or amended by Congress. The statute having been interpreted literally, this interpretation was adhered to for more than sixty years. As stated in *Volume 30, Michigan Law Review, 1148:*

> "Until the seventies it was, to say the least, doubtful whether there was any exception to the literal reading of the statute."[4]

[4] See the case of *Daly v. Sheriff* (D. C. La. 187), 1 Woods 175, holding that a federal court was without authority to issue an injunction against a levy on complain-

No decision expressly based upon the statute seems to have been made between the year 1807 and the year 1872, but in the latter year in the case of *Watson v. Jones*, 13 Wall. 679, in an opinion delivered by Mr. Justice Miller, it was held that an inferior federal court was forbidden by the Act of 1793 to enjoin the defendants in a state proceeding, "to take the possession which the unexecuted decree of the Chancery Court requires the Marshall to deliver to them," and as late as 1929, a federal court which had appointed a receiver for the property of a corporation was deemed to have no right either to enjoin a creditor from prosecuting a suit to establish his debt in a state court or to refuse recognition of the claim when fixed by the judgment of such court. *Riehle v. Margolies*, 279 U. S. 218, 49 Supr. Ct. 310, 73 L. Ed. 669.[5]

Before considering what effect, if any, judicial decisions have had on the Act of 1793, it is necessary to note that Congress has modified the statute in four instances:

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ant's property under process of a state court to which the complainant was not a party. It had been earlier held in the case of *Cropper v. Coburn* (C. C. Mass. 1855), Fed. Case No. 3416, that execution process against property of a stranger to an action was not a "proceeding" in the state court, within the sense of the Statute of 1793.

[5] Between 1872 and 1929, the Supreme Court decided ten cases in which injunctions of federal courts were held void by reason of the Act of 1793; Haines v. Carpenter, 91 U. S. 254 (1876); Dial v. Reynolds, 96 U. S. 340 (1877); Citizens' Bank v. Board, 98 U. S. 140 (1878); Lawrence v. Morgan's R. R., 121 U. S. 634 (1887); *In re* Sawyer, 124 U. S. 200 (1888); United States v. Parkhurst-Davis Mercantile Co., 176 U. S. 317 (1900); Mutual Reserve Fund Life Ass'n v. Phelps, 190 U. S. 147 (1903); Hull v. Burr, 234 U. S. 712 (1914); Essanay Film Mfg. Co. v. Kane, 258 U. S. 358 (1922); Riehle v. Margolies (supra).

(1) In re-enacting the statute in 1874, the exception as to proceedings in bankruptcy was added. (Rev. Stat. 1878, Section 720, 28 U. S. C., Section 379 (1926).[6]

(2) In the Steamship Limited Liability Act of 1851, Congress authorized injunctions to be issued by federal courts to stay state court proceedings. (Rev. Stat. 1878, Section 4283-4286, 46 U. S. C., Section 183-186.)

(3) Removal Statutes (28 U. S. C. Sections 71-83). See *Bondurant v. Watson*, 103 U. S. 281, 26 L. Ed. 447 (1881), wherein the decision upholding the granting of an injunction rests on the ground that the applicable removable statute (1875) in effect amended the re-enactment of the anti-injunction statute in 1874.

(4) Norris-La Guardia Act (March 23, 1932, Chapter 90, Sections 1-15, 47 Stat. 70-73). Presumably an injunction against proceedings in a state court might be permitted if sought in conformity with this statute.

(b) *Ancillary or Auxiliary Injunctions.*

Despite the explicit words of the statute, in 1875, the Supreme Court held in the case of *French v. Hay*, 22 Wall. 238, 250, 22 L. Ed. 854, 857, that when a federal court has once obtained jurisdiction of a case, it would allow an injunction against one of the parties, preventing him from entering suit in a state court to enforce a judgment in a matter on which the federal court was to be called upon to decide. In deciding this case between a citizen of Virginia

[6] "The Revised Statutes of 1874 re-enacted the provision of 1793, but introduced the bankruptcy exception. Rev. Stat. Sec. 720. That might be expected to stiffen the statute in all other respects by virtue of the canon of interpretation, *expressio unius*," 30 *Michigan Law Review* 1144 (1149 footnote 15).

and a citizen of Pennsylvania, the court allowed an injunction to the citizen of Pennsylvania, and ignored the statute of 1793. The bill for an injunction was considered as an auxiliary and not an original one, and in effect, the statute was judicially amended so as to permit an injunction where such was necessary to aid jurisdiction already acquired by the federal court.

(c) *Injunction against the Court and Injunction against the Parties.*

In the case of *Marshall v. Holmes*, 141 U. S. 589, 12 Supr. Ct. 62, 35 L. Ed. 870 (1891), an injunction was permitted against proceedings in a state court on the grounds that while the federal court could not require the state court to vacate its own judgment, yet it might decree that the successful party in the state court might not enjoy the advantage of his judgment if the facts justify such relief. The court stated:

> "A decree to that effect would operate directly upon him, and would not contravene that provision of the statute prohibiting a court of the United States from granting a writ of injunction to stay proceedings in a state court."

That this distinction is completely without merit despite approval in the Supreme Court in *Simon v. Southern Railroad Co.*, 236 U. S. 115-126, 35 Supr. Ct. 255, 59 L. Ed. 492 (1915); Wells Fargo & Co. v. Taylor, 254 U. S. 175-184, 41 Supr. Ct. 93, 65 L. Ed. 205 (1920), it is necessary only to refer to the language of this court in the case of *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U. S. 4, 60 Supr. Ct. 215, 84 L. Ed. 537 (1940), the court stating in reference to an injunction, "That the injunction was a

restraint of the parties and was not formally directed against the state court itself is immaterial."

(d) *Distinction between Proceedings before Judgment and Proceedings after Judgment.*

In the case of *Simon v. Southern Railroad Co.*, (supra),[7] a further distinction was drawn by the Supreme Court. While recognizing the statute prohibiting United States Courts from staying "proceedings" in a state court, the court held that, nonetheless, the statute did not prevent courts of the United States from enjoining a party from gaining the fruits of a fraudulent or void judgment. It is hardly necessary to point out that the word "proceedings" in common usage embraces proceedings both before and after judgment. A decision which endeavors to reconcile itself with Section 265 of the Judicial Code on the grounds that the injunction permitted is not against "proceedings in a state court" because the judgment is already entered, fails completely to consider the purpose for which the statute was adopted, namely, the defense of state courts from federal encroachment.

As a corollary to the *Simon* case, it was held in *Essanay Film Mfg. Co. v. Kane*, (supra), that an injunction might not be granted while proceedings were still pending in the state court. A rule of law which allowing expenses to increase until a judgment is entered in a state court before the granting of an injunction is an illogical result of a labored interpretation of the word "proceedings."

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[7] *See 30 Michigan Law Review, pages 1155-1161.*

(e) *Distinction between Proceedings in Rem and Proceedings in Personam.*

The gravamen of the decision in *Kline v. Burke Construction Co.*, 260 U. S. 226, 43 Supr. Ct. 79, 67 L. Ed. 226 (1922), is that an ancillary injunction will not be granted by a federal court except where the control of the federal court over specific things, or persons is at stake. The decision holds that when one court takes into its jurisdiction a specific thing, that thing or res, is completely withdrawn from the judicial power of any other court. Another holding of the decision would seem to be that superiority of judgment depends on whether the state or federal court first enters judgment, however, in the case of *French v. Hay* (supra) in which no res was held by the federal court, a judgment was enjoined in the state court before the case came on to be heard in the federal court. There would seem to be no way of explaining the irreconcilable conflict between these two decisions.

If the rule as to control of the res is to be accepted, as grounds for an ancillary injunction, there is no basis for relief in the case at bar. A foreclosure action in rem in Iowa cannot conceivably bear fruits beyond the issues of the cause, so as to bar the present petitioner from proceeding in Delaware on rights of action which were not part of the trust res in Iowa.

As stated in *Guardian Trust Co. v. Kansas City Southern Railway Co.*, (C. C. A. 8) 171 Fed. 43 (50):

> "• • • the unquestioned rule that the pendency in a state or other court of an action *in personam* which involves no claim to or lien upon specific property in the possession or under the dominion of a national court of

> equity and no issue of which, that court has acquired exclusive jurisdiction, presents no ground for a dependent bill to stay it."

(f) *State Judgment Obtained by Fraud or Mistake.*

In the case of *Wells Fargo & Co. v. Taylor*, 254 U. S. 175, 41 Supr. Ct. 93, 65 L. Ed. 205 (1920), the court held that Section 265 of the Judicial Code did not prevent federal courts from depriving a party,

> "of the benefit of a judgment obtained in a state court in circumstances where its enforcement will be contrary to recognized principles of equity and the standards of good conscience. * * * 'The Circuit Courts of the United States have the same jurisdiction and power to enjoin a judgment plaintiff from enforcing an unconscionable judgment of a state court, which has been procured by fraud, accident, or mistake, that they have to restrain him from collecting a like judgment of a federal court.' "

If the court intended to limit the exception to instances of "fraud, accident, or mistake", such an exception has no bearing on the case at bar inasmuch as there is no contention that the judgment entered for the plaintiff, Phoenix Finance Corporation, in the Superior Court of New Castle County, Delaware, was entered fraudulently, accidentally, or through a mistake. Likewise, the other actions pending in Delaware prior to the injunction were all properly instituted and general appearances were entered by the defendant.

If the case intended to pass on the broader phases of injunction relief against proceedings in state courts, it is significant to note that in the case of *Essanay Film Mfg. Co. v. Kane* (supra), decided after the *Wells Fargo* case, it is stated by Mr. Justice Pitney:

> "• • • since 1793, the prohibition of the use of injunction from a federal court to stay proceedings in a state court has been maintained continuously, and has been consistently upheld."

CONCLUSION.

While Section 265 of the Judicial Code is not a jurisdictional statute, it is nonetheless a legislative limitation on the general equity powers of the federal courts, and can in no way be deemed to be controlled or affected by the general terms of Section 262 of the Judicial Code.

It cannot be denied that the Supreme Court in the past has failed consistently to sustain the anti-injunction statute, but it is respectfully urged that judicially engrafted amendments to the act be cut from the language approved by the Congress.

That such action on the part of this court is not only in conformity with the duties of the court, but also of practical necessity is well expressed in the words of Mr. Justice Frankfurter written in 1928:

> "If diversion from the lower federal courts of controversies which state courts can settle adequately enough would help save the Supreme Court for its more essential labors, this would be a gain of moment."[8]

Respectfully submitted,

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[8] *13 Cornell Law Quarterly 499 (506).*



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No. 624.

PHOENIX FINANCE CORPORATION, A CORPORATION OF THE STATE OF DELAWARE,
PETITIONER,

VS.

IOWA-WISCONSIN BRIDGE COMPANY, A CORPORATION OF THE STATE OF DELAWARE,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR RESPONDENT, IOWA-WISCONSIN BRIDGE COMPANY.

FRED A. ONTJES,
WM. C. GREEN,
Counsel for said Respondent.

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FOREWORD.

In answer to page one of the petition entitled "Foreword," respondent states that the claimed decision of the Superior Court of New Castle County, Delaware, is not a part of this record. That opinion was not filed until after the hearing on permanent writ of injunction in the United States District Court and submission thereof, and this cause does not involve the construction of any Delaware statutes or any decisions construing such statutes, but on the contrary involves the enforcement of the judgments and orders of the United States District Court for the Northern District of Iowa and of the Eighth Circuit Court of Appeals, which is governed by the decisions of the Iowa Supreme Court and of the federal courts.

The case of *American Surety Company* v. *Baldwin*, 287 U. S. 156, 53 S. Ct. 98, cited by petitioner, involved the question of granting writ of certiorari to the Supreme Court of Idaho on decision rendered by it reversing an order vacating a judgment against the surety company. In addition to applying for certiorari the surety company made another motion in the state court to correct, amend and vacate the judgment involved in the petition, and also took a direct appeal from that judgment to the Supreme Court of Idaho. The decision on the petition was evidently withheld because if the last two steps mentioned resulted favorably to the surety company the whole matter would be disposed of without decision on the petition.

Such is not the situation in the instant case. A decision by the Delaware Supreme Court in that case involving one of the suits enjoined, whether favorable or unfavorable to the petitioner, could have no particular bearing on this petition. No occasion for delay exists, and it is to be presumed that if certiorari is denied that the petitioner will comply with the permanent writ of injunction and dismiss said Delaware case and satisfy any judgment rendered therein, and if it does not that the Delaware Supreme Court will follow the decision in this case and reverse the decision of the Superior Court.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No. 624.

PHOENIX FINANCE CORPORATION, A CORPORATION OF THE STATE OF DELAWARE, PETITIONER,

VS.

IOWA-WISCONSIN BRIDGE COMPANY, A CORPORATION OF THE STATE OF DELAWARE, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR RESPONDENT, IOWA-WISCONSIN BRIDGE COMPANY.

OPINIONS BELOW.

The original decisions of the district court (F.R. *1, pp. 156 to 204 and 208 to 211 and 411 to 413), are reported in 19 Fed. Supp. 127, and the opinion of the

*1. Whenever in this brief reference is made to the original or first record in this cause on the former petition in this court for certiorari by Phoenix Finance Corporation (No. 438, October Term, 1938), the letters "F R" will be used in the reference, and the letters "F.R. Supp." will be used in the reference to the supplemental volume thereof; and whenever reference is made to the record on supplemental and ancillary proceedings, the letter "R" will be used in the reference.

Circuit Court of Appeals for the Eighth Circuit on the first appeal (F.R. Vol. VI, pp. 1689 to 1709), is reported in 98 Fed. (2) 416. On permanent writ of injunction the district court's findings of fact and conclusions of law appear (R. pp. 700 to 717), opinion of the district court (R. pp. 717 to 719), and final decree on permanent injunction appears (R. pp. 719 to 720). The opinion and decree of the Circuit Court of Appeals on permanent writ of injunction appears in the record at pages 767 to 788, and is reported in 115 Fed. (2) 1.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on August 26, 1940 (R. pp. 787-788). The petition for writ of certiorari was filed on the 13th day of December, 1940. The jurisdiction of this court is sought to be invoked under sub-paragraph 2, of Section 240 of the Federal Judicial Code as amended (28 U.S.C.A., sec. 247).

QUESTIONS PRESENTED.

(1) Whether Phoenix was such a party to the foreclosure proceeding as that it is bound by the findings and decree entered therein.

(2) Whether the validity of the bonds and the consideration received for them were adjudicated in the foreclosure case, that is whether the decree in the foreclosure case affirmed by the Circuit Court of Appeals is *res judicata* of the controversies involved in the supplemental and ancillary proceedings.

(3) Whether the injunction is a violation of Section 265 of the Judicial Code or of the Fifth Amendment to the Constitution.

(4) Whether the burden was upon respondent to show that the decree in the foreclosure was a "right" one and not obtained by fraud.

STATEMENT OF THE CASE.

Because of inaccuracies, misstatements and omissions in the statement submitted by petitioner, it is necessary for the respondent to submit a brief statement of the case.

This case came to the Circuit Court of Appeals for the Eighth Circuit a second time, on an appeal from a decree of the District Court for the Northern District of Iowa, entered after hearing on supplemental and ancillary bill, granting permanent writ of injunction to protect the fruits of the prior decrees and orders of the federal courts in this cause and to enforce the same and restraining and enjoining the violation thereof and the commencement and prosecution of harassing, vexatious and annoying litigation.

The Original Proceedings.

The original bill in this case was filed by the First Trust & Savings Bank (formerly Bechtel Trust Company), resident of Iowa, and A. H. Schubert, a resident of Wisconsin, as trustees, versus Iowa-Wisconsin Bridge Company, a Delaware corporation, on August 28, 1933, for the foreclosure of a deed of trust securing an alleged $200,000 bond issue. The action was instituted at the request and instigation of appellant, Phoenix Finance Corporation, and carried on at the expense of and under the direction of said Phoenix Finance Corporation by attorneys of its selection. (F.R. p. 537; Exhibit 28, H.E.B., F.R. pp. 789-791, especially top p.

790, offered F.R. p. 535; Exhibit B, H.E.B., F.R. bottom p. 794 and top p. 795, offered F.R. p. 537; Exhibits B-1, H.E.B. (403 H.L.B.), B-2, H.E.B. (404 H.L.B.), B-3, B-4, B-5, B-6 and B-7, H.E.B., F.R. pp. 1478-1482; pp. 617, 695, approved as part of narrative statement, F.R. pp. 709, 720-21, 723; Exhibit B-6, on stationery Phoenix Finance System, predecessor Phoenix Finance Corporation, signed John A. Thompson, who was president of Phoenix Finance Corporation and of its predecessor, F.R. 1481; approved as part of narrative statement, F.R. 709, 723.)

The bill alleged jurisdiction based on diversity of citizenship, and alleged a deed of trust in the ordinary form of a mortgage trust deed securing a bond issue of $200,000, making it the duty of the bridge company to pay taxes on the mortgaged property (F.R. p. 31) to pay interest on the bonds, and to pay the bonds as they matured (F.R. p. 29). In case of default for a period of sixty (60) days, it was provided that the trustees "may," and upon the written request of the holders of twenty-five per cent of the bonds then in default "shall" declare the principal of all the bonds due (F.R. p. 35), and "shall proceed to protect and enforce their rights and the rights of the bondholders, under this indenture by a suit or suits in equity or at law * * * by * * * foreclosure hereunder, or for the enforcement of any other appropriate legal or equitable remedy, as the trustees * * * shall deem most effectual" (F.R. pp. 37-38) and in addition to Section 13 (F.R. pp. 43-44) of the mortgage or trust deed, quoted from in the first opinion of the Circuit Court of Appeals (98 Fed. (2) 416, at 420), it also provided: "Section 10. The company covenants that (1) in case default shall be made in the payment of any interest on any

bond or bonds at any time outstanding and secured by this indenture, and any such default shall continue for a period of sixty days, or (2) in case default shall be made in the payment of the principal of any such bond when the same shall become payable, whether by the regular maturity of said bond, or by declaration as authorized by this indenture, or by sale as provided in Section 6 of this article, or otherwise, then upon demand of the trustees the company will pay to the trustees, for the benefit of the holders of the bonds and coupons hereby secured then outstanding, the whole amount due and payable on all such bonds and coupons then outstanding, for interest or principal or both, as the case may be, with interest upon the over due principal and/or installments of interest of each such bond at the coupon rate, *and in case the company shall fail to pay the same forthwith upon such demand, the trustees in their own names, and as trustees of an express trust, shall be entitled to recover judgment for the whole amount so due and unpaid.*

"*The trustees shall be entitled to recover judgment as aforesaid, either before or after or during the pendency, of any proceeding for the enforcement of the lien of this indenture upon the trust property, and the right of the trustees to recover such judgment shall not be affected by any sale hereunder, or by the exercise of any other right, power or remedy for the enforcement of the provisions of this indenture, or for the foreclosure of the lien hereof*; and in case of a sale of the mortgaged property, and of the application of the proceeds of such sale to the payment of the debt, the trustees in their own names and as trustees of an express trust, shall be entitled to enforce payment of and to receive the amount

then remaining due and unpaid upon any and all bonds issued hereunder and then outstanding for the benefit of the holders thereof, and shall be entitled to recover judgment for any portion of the debt remaining unpaid, with interest. * * *" (F.R. pp. 41-44.) (Emphasis supplied.)

The bill alleged that all of said bonds were duly made and executed on behalf of the bridge company, duly presented to and authenticated by Bechtel Trust Company (trust company) as in said mortgage deed of trust provided, and that all of said bonds, together with interest coupons attached thereto evidencing interest thereon as aforesaid, have now been issued for a *good and valuable consideration and are now outstanding in the hands of divers persons and corporations who are now the owners and holders thereof for value.* Said bonds and interest coupons are valid obligations of said Iowa-Wisconsin Bridge Company, and are entitled to the benefit and security of said mortgage deed of trust. The bill further alleged authority of the trustees to sue under the terms of the deed of trust, default and acceleration of due date, and prayed:

That an account be taken of the bonds and interest coupons secured by said mortgage deed of trust *and the amount due on the bonds* for principal and interest or otherwise, * * * that said Iowa-Wisconsin Bridge Company be decreed to pay to complainants the *amount found due on such accounting* * * * within a short day to be fixed by the court, and that in default of payment the mortgaged property be sold * * * to satisfy the amount so found due and costs, and in case of such sale defendant * * * be barred and foreclosed of all equity of redemption * * *; that in event proceeds

of such sale shall not be sufficient to satisfy in full the decree to be rendered in this suit, that these complainants *have a decree* against said Iowa-Wisconsin Bridge Company for the *deficiency*; and prayed for a receiver of all the property of the defendant and for general equitable relief. (F.R. pp. 10-11.) (Emphasis supplied.)

It will be noted that the prayer asks (1) the determination of the amount due on the bonds and coupons, (2) a short day to pay, (3) then strict foreclosure without redemption, (4) deficiency judgment, (5) general equitable relief.

On the same day, August 28, 1933, the complainants moved for the appointment of a receiver as prayed (F.R. 60). On the 25th day of September, 1933, defendant bridge company filed answer (F.R. 60-66) denying complainants were entitled to the relief prayed, denied the validity of the mortgage deed of trust, alleged that there was a good defense to all or part of the bonds, and prayed that the plaintiffs be required to make a complete showing as to the consideration received by the bridge company in each and every instance for the delivery of the bonds, and denied complainants' right to the appointment of a receiver (F.R. 62-66).

Appointment of Receiver.

On September 28, 1933, the court appointed a receiver of all of the property of the bridge company of every kind and took the same into legal custody (F.R. pp. 68-72). The court then had full, complete and exclusive jurisdiction of the parties and the subject matter of the action.

Intervention.

On December 5, 1933, by leave of court, Fayette D. Kendrick, a stockholder of the bridge company, and citizen of Minnesota, intervened on behalf of defendant, himself and all other stockholders similarly situated (F.R. pp. 73-83) praying that the complainant's bill be dismissed, the bonds cancelled and the deed of trust set aside and for general equitable relief. He alleged that John A. Thompson and his associates, officers and directors of the Phoenix Finance System, Inc., predecessor of the petitioner, dominated the bridge company, and by the exercise of such domination, fraudulently procured the execution and delivery of the deed of trust and the issuance of the bonds to corporations controlled by them; that all of the bonds and mortgage deed of trust were issued as a part of the fraudulent scheme, plan and conspiracy without consideration, with intent to cheat and defraud the bridge company and its stockholders out of their property; that in pursuance thereof part of the bonds issued were fraudulently obtained by cancelling stock and that the bonds and mortgage were fraudulent, without consideration, invalid and void; that none of the bonds had passed to innocent purchasers for value without notice; that said John A. Thompson and his associates in conspiracy still were in control of the defendant bridge company and that demand by interveners to obtain relief from or through said defendant corporation would be unavailing (F.R. pp. 73-83; amendment to petition of intervention, F.R. pp. 100 to 102). On December 5, 1933, the court granted the intervention (F.R. pp. 85 to 86). The master and the court found that the bridge company was not making and would not have made a good faith defense to complainant's action had not the interveners intervened (F.R. pp. 160-183).

Phoenix Finance Corporation Made a Party.

On the 5th day of December, 1933, the interveners made a motion that Phoenix Finance System, Inc., and certain other corporations be made parties (F.R. 83-84, folio 119), and on hearing thereof the court found that complainants' counsel stated in open court that Phoenix Finance Corporation had succeeded Phoenix Finance System, Inc., and was the holder of the bonds involved in the action with the exception of about $10,000 worth of said bonds. The court thereupon granted the motion and ordered that Phoenix Finance System, Inc., and Phoenix Finance Corporation *be made parties plaintiff in the cause, and defendants to the petition of intervention,* and that the clerk issue necessary summons for said purpose (F.R. 86). Subpoena directed to Phoenix Finance Corporation making it a party was duly served on said corporation (F.R. 87-89, folios 126-127). It appeared (F.R. 89).

By order of court the petition of intervention was taken as an answer to the bill (F.R. 100).

Phoenix Finance Corporation filed an answer to the petition of intervention on information and belief denying all the allegations thereof and alleging that it was the *owner and holder for value of a large amount of bonds of the Iowa-Wisconsin Bridge Company* issued in accordance with the mortgage declared on in the bill of foreclosnre and prayed for general equitable relief (emphasis supplied). (F.R. pp. 91-92.) The trustees filed reply to the petition of intervention denying the allegations thereof, etc. (F.R. 102-103).

The trustees filed a resistance to intervener's application for the production of books and papers of Phoenix Finance Corporation (F.R. 92-96 and 96-97). On the

24th of April, 1934, the court entered an order that Phoenix Finance Corporation produce all of its books and records pertaining to the business and affairs of the Iowa-Wisconsin Bridge Company (F.R. 97-98), but such books, records and papers were never produced (F.R. 614-616; bottom 396 to 399).

Other stockholders of the bridge company, residents of Iowa, intervened and adopted the pleadings filed by Kendrick (F.R. 104, 105 and 107).

On the 5th day of December, 1934, counsel for the parties agreeing, the court appointed a special master to hear all of the issues in the cause, to take the evidence and proofs according to law, to examine the questions in issue, and to "report from said evidence his findings of fact and conclusions of law in respect to all issues herein, to report his conclusions as to whether the evidence and pleadings *entitle the complainants or other parties herein to the relief or any part thereof* prayed for in their respective pleadings, etc." (F.R. 107-108).

On the trial before the master the trustees appeared by attorneys selected by the petitioner, Phoenix Finance Corporation, hereinafter called Phoenix, and the Phoenix appeared by attorney W. B. Sloan. (F.R. 531, 537; F.R. 794-795; F.R. 1479-1482.)

The complainants called John A. Thompson, president of complainant, Phoenix, in their main case, who testified as to claimed considerations for the bonds, and who was cross examined on that subject. (F.R. pp. 238-242; F.R. pp. 242 to 545; F.R. pp. 545-556; F.R. pp. 560-561; F.R. pp. 562-564; F.R. pp. 633-637; F.R. pp. 673-675; F.R. pp. 675-678; F.R. bottom p. 675 to p. 685; F.R. pp. 691-692.)

The claimed considerations involved in the case are summarized in the first decision of the Eighth Circuit Court of Appeals (98 Fed. (2) 416, at 424) and are the same as those summarized in that court's opinion on permanent writ of injunction. (*Phoenix Finance Corporation* v. *Iowa-Wisconsin Bridge Co.*, 115 Fed. (2) 1, at 7.)

A large amount of testimony, depositions and exhibits were offered in evidence, as shown by the five volumes of the first record. At the conclusion of the trial the master stated: "* * * I would like to have the theory of all parties definitely in reference to the consideration, etc." (F.R. p. 693.) Written briefs and arguments were filed. (F.R. p. 693.) The case was finally orally argued before the master on the 25th day of October, 1935, and *submitted in its entirety.* (F.R. 694.)

Petitioner, Phoenix', statement on page five of its petition, "Tacit understanding of all parties and master as to procedure at trial was that there were two stages in the proceedings, viz.: (1) The issue of the validity of the deed of trust, and, if deed of trust was found valid to any extent and foreclosure ordered, (2) The issue as to what bonds were validly entitled to participate in proceeds of sale" is without foundation and directly contrary to the record.

(a) The case was referred in its entirety to the master "To report * * * whether the evidence and pleadings entitled the complainants or other parties herein to the relief or any part thereof prayed for in their respective pleadings, etc." (F.R. 107-108.) (b) Counsel for the parties on oral argument of the cause before the master on October 25, 1935, stated directly that the case was being submitted in its entirety.

Mr. Fowler, counsel for complainants: "There is a question in this case as to whether or not at this particular time the master should recommend that a decree of foreclosure be entered, and the question of which of the bonds are to participate be reserved or taken up at a later date. *I do not suggest for a moment that this testimony will have to be reopened.* * * * And as I said in our opening argument, I think under this record, you can use your own judgment, the master can use his own judgment as to whether he wants to decide this all at this time. * * *"

Mr. Ontjes, counsel for interveners: "Mr. Fowler talks about piece-meal trials. Your Honor, we didn't enter into this trial as any piece-meal proposition. We had no piece-meal ideas in our mind when Mr. Green and I presented our citations in this matter for the taking of these depositions and this evidence. It is our contention that we are trying and submitting this case in its entirety at this time * * *" (F.R. 694-695; 406-408; F.R. 394-413).

Complainants' counsel at that time also stated: "We represent all of the bondholders" (F.R. 695), also see counsel's statement (F.R. 533).

The master on March 18, 1936, filed a comprehensive report (F.R. 115-138), to which all parties excepted. (Trustees' F.R. Supp. 3-14; Phoenix Finance Corporation, F.R. Supp. 14-58; bridge company and interveners, F.R. 148-156.)

After hearing the conclusions of the master were adopted by the court with some modifications and amplified with additional findings.

The court made findings of fact and conclusions of law and entered its decree containing the following statement: "That the mortgage and bonds in suit were fraudulently issued. That all bonds are without valid consideration, with the exception of the bonds aggregating $15,000 hereinafter specified," then specifying bonds held by parties other than Phoenix. (*Bechtel Trust Company, et al.* v. *Iowa-Wisconsin Bridge Co., Fayette D. Kendrick, et al., interveners,* 19 Fed. Supp. 127; F.R. 156-204.) Foreclosure was denied, but the receivership was continued for the purpose of impounding the income of the bridge company until the $15,000 of obligations found to be meritorious should be paid (F.R. p. 204).

Petitioner, Phoenix' statement on page five of its petition "No evidence of fraud on part of Phoenix Finance System, Inc. chargeable in any way to Phoenix," is directly contrary to the record.

The court found that the Phoenix Finance Corporation had succeeded the Phoenix Finance System, Inc., and ordered that it be made a party (F.R. p. 86). The evidence identified the interest between Phoenix Finance Corporation and Phoenix Finance System, Inc., as actors in the fraudulent conspiracy, and the succession of the latter by the former.

The court found: that "the Phoenix Finance Corporation at the time of its organization was officered and controlled by the same officers as the Phoenix Finance System, Inc., and took over the succession both of assets and liabilities, with full notice of the facts and circumstances surrounding the bond issue in controversy in this case, and assumed the entire fruits and activities of its predecessor, so far as concerns this case, and

proceeded to carry on with the same notice and purpose, adopting all of the plans and results of its predecessor" (F.R. 202). And the Circuit Court of Appeals with reference thereto stated: "Inasmuch as the district court found that Phoenix Finance Corporation was in all respects so far as concerns this case the successor of Phoenix Finance System, Inc., and managed by the same officers, both corporations are hereinafter indiscriminately referred to as Phoenix" (F.R. vol. 6, p. 1690, 98 Fed. (2) 416, at 419). *2.

The district court held that all of the transactions leading up to the issuance of the bonds were steps in a single fraudulent plan, scheme and conspiracy to acquire ownership of the bridge company's property to the exclusion of the bridge company and its stockholders (F.R. 157). This was affirmed by the Circuit Court of Appeals (98 Fed. (2) 416, at 428).

On December 19, 1937, Phoenix Finance Corporation filed a motion to vacate and expunge and set aside the decree, findings of fact, opinion, etc., on the ground that no diversity of citizenship existed upon which jurisdiction in the case could be based (F.R. 204-205), to which motion the bridge company filed a resistance (F.R. 206-208). The motion was overruled (F.R. 208-211). On January 29, 1937, the trustees filed a motion

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*2. Where several persons combine to carry out a fraudulent conspiracy to cheat another, each and all of such persons are liable to the defrauded party, without reference to the amount of the fruits of the fraudulent transaction he obtains, or the degree of his activity in the scheme * * *. It is not necessary that they be in **pari delicto**. It is enough that each was at some time and in some degree a party and an aider of the improper transaction. Fletcher Cyc. of Corp. (Perm. ed.), Vol. 1, Sec. 158, pp. 650-655; **McCandless v. Furland**, 296 U. S. 140, 56 S. Ct. 41; **Irving Trust Co. v. Deutsch** (C.C.A.), 73 Fed. (2) 121, 123; **Jackson v. Smith**, 254 U. S. 586, 41 S. Ct. 200, 65 L. ed. 418.

for dismissal and in the alternative petition for rehearing, division one claiming want of jurisdiction as claimed in Phoenix' prior motion and asking dismissal (division one overruled) (F.R. 411); division two in the alternative petition for rehearing, adopting the petition for rehearing of Phoenix Finance Corporation (F.R. 211-214). On the same day Phoenix Finance Corporation filed petition for rehearing and in the alternative for modification of decree. Both petitions were verified by Phoenix' president, John A. Thompson (F.R. 216-223). In this petition of Phoenix filed after its voluminous exceptions to the master's report had been overruled, it alleged its present assertion of two stages in the proceedings, and that the master received the submission of the case under a misapprehension, and re-asserted its claimed considerations for bonds asserted on the trial and in its exceptions to the master's report (F.R. 216-223), and prayed in the alternative (1) for rehearing; (2) in case denied, then as alternative relief that the decree be modified so as to withhold from adjudication the question of the validity of the $50,000 mortgage given by the bridge company to petitioner, reserving the right to petitioner to litigate said mortgage in another action if it so desires; (3) that the decree be so modified as to reinvest petitioner 517 shares of "A" stock surrendered in exchange for bonds; (4) that decree be modified so as to withhold from adjudication the right of petitioner to institute an action at law against the bridge company, if it so desires, for money had and received (F.R. 223). The bridge company and interveners filed answer and resistance to the petition (F.R. 394-410). There was no misapprehension. The case was submitted in its entirety (F.R. 694-695). The petitions for new trial and for modification of decree were over-

ruled. (Court's opinion, F.R. 411-413; 19 Fed. Supp. 127, at 142.)

The trustees and Phoenix, complainants, appealed from the opinion, findings of fact and final decree and from the court's ruling on the motions to vacate the decree, and from the court's ruling on petitions for rehearing and modification of decree to the Eighth Circuit Court of Appeals. Both the trustees and Phoenix filed assignments of error signed by the same counsel (F.R. 501-528). Phoenix executed the appeal bond as principal and filed it (F.R. 528-529). It was asserted, among other things, in such assignments of error that Phoenix was a proper, necessary and indispensable party, and that after it was joined as a party diversity of citizenship no longer existed because both Phoenix and the defendant bridge company were citizens of Delaware. "That to adjudicate the invalidity of the bonds held by the Phoenix Finance Corporation, which was the principal effect of the decree, said Phoenix Finance Corporation was an indispensable party to the proceedings, and the making of it a party for such purpose and effect destroyed the diversity of citizenship necessary to the maintenance of said suit in said court." (Trustees' assignments 3, 4 and 5, F.R. pp. 502-503; Phoenix' assignments 3, 4, 5 and 6, F.R. 508-509.)

The Circuit Court of Appeals held "Had Phoenix not become a party the court could have proceeded to final judgment, granting or denying foreclosure. It could have decided every issue, including the validity of the trust deed and the amount of the debt secured thereby; and the decree would have been binding upon the bondholders without their presence as parties to the record." (F.R. 1694, 98 Fed. (2) 416, at 421.) Phoenix contended that the proceeding was a consolidation of two separate and

distinct suits, one brought by the trustees to foreclose the trust deed and one brought by the bridge company and interveners to cancel the bonds held by the Phoenix; and that jurisdiction as to each controversy must be determined separately. The Circuit Court of Appeals held this contention without merit, and stated:

> "If the controversy between the two Delaware corporations should in any way be considered as a separate controversy, involving only the validity of certain of the bonds, then it was ancillary to the foreclosure proceeding, and jurisdiction attached irrespective of citizenship, because the matter had been drawn into the Federal Court under the receivership before Phoenix became a party (citing cases). The court did not err in overruling appellants' attack on the jurisdiction." (F.R. 1694, 98 Fed. (2) 416, at 421.)

It was also asserted in the trustees' and Phoenix' assignments of error that the bridge company received full consideration for the bonds, that the decree was broader than the issues, that Phoenix was entitled to foreclosure for the bonds held by it and that the court erroneously denied petition for rehearing and erred in refusing to modify the decree and to compel the defendant to restore to Phoenix 517 shares of the bridge company stock exchanged for bonds (F.R. pp. 510-528 and pp. 503-507). All such assignments were overruled by the Circuit Court of Appeals and the district court's decree, findings, rulings and orders affirmed. (F.R. 1695-1709, 98 Fed. (2) 416, at 421-429.) Phoenix filed in the United States Supreme Court a petition for writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit, which was denied (305 U. S. 650, 676; No. 438, Oct. Term, 1938), in which petition

Phoenix asserted the same claims with respect to jurisdiction as are asserted in the present petition, citing thirty-one of the cases cited in the present petition, Article Three, Section Two, and the Fifth and Tenth Amendments of the Constitution of the United States, and Short on Mortgages, Sections 274 and 497, cited in the present petition. The respondent respectfully asks this Honorable Court to take judicial notice of Phoenix' said petition for writ of certiorari filed in cause No. 438, and of respondent's brief in response thereto.

Supplemental and Ancillary Bill.

On the 18th day of September, 1939, the respondent with leave of court filed a supplemental and ancillary bill against Phoenix in the foreclosure proceeding, reciting the history of the litigation and commencement of suits in the state courts of Delaware by the Phoenix and the recording of a mortgage held fraudulent, alleging that all the matters involved in the cases in Delaware were adjudicated in the foreclosure suit, and that Phoenix was threatening to institute and prosecute further actions against the bridge company upon similar alleged causes of action, and praying (1) for preliminary and permanent injunction restraining Phoenix (a) from further prosecuting the suits already begun, (b) from bringing further actions, and (2) for decree commanding Phoenix to dismiss the suits already begun and to satisfy of record a certain $50,000.00 mortgage involved in the foreclosure suit and to surrender the notes purporting to be secured thereby. (R. 2 to 12 and 13 to 97 and amendment pp. 97 to 100.) On the 18th day of September, 1939, respondent filed motion for preliminary injunction, which was by order set for hearing for the 28th day of September, 1939 (R. 101-106). Phoenix filed resistance (R. 112-

118). After hearing on September 28, 1939, the court on the 7th day of October, 1939, granted preliminary writ of injunction. (R. 118-141; especially 132 and p. 145.)

The answer of the Phoenix denies that the matters involved in the Delaware action were adjudicated in the foreclosure suit. Parts of the answer were upon motion of respondent stricken, and the introduction of testimony contradicting the findings and decree in the foreclosure proceeding was denied. (R. 56-176; motion, 167-171; order striking parts of answer, R. 171-172; evidence, R. 272-293.)

Petitioner, Phoenix, states on page 26 of its present brief: "The first affirmative step by Phoenix Finance Corporation was to petition for rehearing after the decree. This was refused because of a mistake of the District Court induced by the deliberate misrepresentation by counsel for the intervener, Kendrick, and other fraudulent tactics on the part of said counsel, his associate, and one of the interveners." This statement is without foundation in the record and the citations of petitioner therefor are only to a portion of its answer stricken and to rulings of the court that certain depositions be not taken and to an offer of proof in contravention of the record. In that part of the answer to which petitioner refers, which was stricken, it was alleged:

"That in support of the petition for rehearing, counsel for Phoenix submitted affidavits of witnesses and that it endeavored to procure affidavits from other witnesses to substantiate the allegations of the petition for rehearing, and that on account of alleged representations of counsel for interveners and an intervener, it was unable to obtain them" (R. 166-167).

The allegations in said paragraph 44 of the answer show on their face that the pretended affidavits or evidence could have been only cumulative in any event. That such a course of procedure is wholly inadmissible under the settled rule of *res judicata*, is held in *So. Pac. R. Co.* v. *U. S.* (168 U. S. 1, 18 S. Ct. 18, at 33). The allegations are mere opinions and conclusion, incompetent, irrelevant and immaterial. There is no allegation as to what it is claimed the so-called "other witnesses" (not named) know or claimed to know with respect to the facts in this case, nor what it is claimed they would have asserted in such affidavits, or what they would testify to, nor that any of them had any connection with or to do with any of the matters involved in this case, or knowledge thereof. The record shows that the persons who had to do with the various transactions involved in this case were called as witnesses on depositions, or as witnesses at the trial, and nothing is alleged as to what it is claimed any of the so-called "other witnesses" would have made affidavit to not contained in evidence on the trial or in Phoenix' petition for rehearing and affidavits attached thereto. Phoenix attached to its petition for rehearing of January, 1937, the affidavits of its then counsel and thirty-six purported affidavits of stockholders, former directors and others (F.R. pp. 216-391), and if there had been any interference with its procurement of affidavits there is no question but that the then counsel for Phoenix would have learned of that while they were gathering the numerous alleged affidavits presented, and would have asserted it in its petition for rehearing and affidavits in support thereof. The assertion in said paragraph 44 was made for the first time in 1939 when Phoenix was called upon to obey the decrees and orders of the trial court and of this court, and appearing by counsel

from Delaware. Furthermore, if the alleged representations had been made, this record is replete with evidence that they would have been true. The trial court and this court found John A. Thompson to be guilty of conspiracy and it would have been perfectly proper for interveners' counsel, if consulted, to have advised persons to be careful not to make false affidavits." (Also see answer and resistance to petition for rehearing and modification of decree and ruling thereon and court's opinion, F.R. 394 to 413, and motion to strike and court's ruling thereon, R. 170-172).

On the 11th day of March, 1940, trial was had on the supplemental and ancillary bill and answer thereto (F.R. 257-239). The court was asked to take judicial notice of all pleadings filed in the case, and all the depositions taken, and all the evidence taken, and the transcripts of such evidence, and of the master's report, and of the exceptions filed to such report, and the opinion, order and decree of the court made with respect to the exceptions to the master's report, and the final decree in the cause, the petition for rehearing filed by Phoenix, the supplemental opinion and order of the court with respect thereto, and without exception to take judicial notice of all records, papers and files in the cause, and all of them were offered in evidence, including the opinion of the Circuit Court of Appeals, reported in 98 Fed. (2) 416, and that court's mandate (R. 260-261). And certified exemplified copies of the summons and declarations in the Delaware cases, and of the mortgage covered by the permanent writ of injunction were offered in evidence (R. 262 to 272).

The court found that Phoenix for the purpose of attempting to invalidate and nullify the prior lawful decree and orders of the court and for the purpose of depriving

the respondent of the fruits and advantages of said adjudications and for the purpose of harassing, vexing and annoying respondent, had commenced and was prosecuting in the State of Delaware various actions involving the same matters fully and finally determined by the prior adjudications of the federal court and had in contempt of court filed of record a $50,000 mortgage held fraudulent and invalid by the court's prior decree (F.R. 191-192).

The court found that all the ultimate facts and issues involved in and presented in each of the actions pending in Delaware mentioned in the opinion of the Circuit Court of Appeals, were within the issues involved and fully considered and determined by the court in its original decree and order denying petition for rehearing and modification of decree, affirmed by the Circuit Court of Appeals (R. 710-711), and found that by the recording of the alleged $50,000 mortgage Phoenix had wrongfully cast a cloud upon the title of the Iowa-Wisconsin Bridge Company to its property, and had attempted to render null and void that portion of the findings and decree and order of the court finally determining the invalidity of said mortgage (R. 712-713). Complete *findings of fact* and conclusions of law of the court appear (R. 700-717). The trial court's opinion which furnishes a complete answer to Phoenix' petition appears (R. 717-719). The court's decree granted the permanent prohibitory and mandatory injunction prayed (R. 719-722). An appeal having been taken to the Circuit Court of Appeals for the Eighth Circuit, that court on October 26, 1940, unanimously affirmed the *findings of fact* and conclusions of law and decree of the district court on its merits (R. 767-788 and R. 831. 115 Fed. (2) 1).

The opinion of the Circuit Court of Appeals clearly summarizes the issues involved in the supplemental and ancillary proceedings and the facts and the identity of the matters involved in those proceedings with those involved in the foreclosure suit.

In the interest of brevity, the portion of the opinion of the court below containing this summary, with appropriate record references, is printed as an appendix hereto (*infra*, pp. 56-57).

ARGUMENT.

Summary of Argument.

Point One. Phoenix was such a party to the foreclosure proceeding as that it is bound by the findings, decree and orders entered therein.

Point Two. The validity of the bonds and the considerations received for them were adjudicated in the foreclosure case, and the decree in that case is affirmed by the Eighth Circuit Court of Appeals, is *res adjudicata* of the controversies involved in the supplemental and ancillary proceedings.

Point Three. The injunction is not a violation of Section 265 of the Judicial Code or of the Fifth Amendment to the Constitution.

Point Four. The burden was not upon the respondent to show that the decree in the foreclosure case was a "right" one and not obtained by fraud.

POINT ONE.

Phoenix was such a party to the foreclosure proceeding as that it is bound by the findings, decree and orders entered therein.

The argument on this point answers petitioner's argument on its points 1 and 2, brief pp. 30-38.

On the first appeal in this case (*First Trust & Savings Bank, et al.* v. *Iowa-Wisconsin Bridge Company, et al.*, 98 Fed. (2) 416, at 421; F.R., Vol. VI, pp. 1689, at 1694), the court held that Phoenix was represented by the trustees and held: "It could have decided every issue, including the invalidity of the trust deed and the amount of the debt secured thereby; and the decree would have been binding upon the bondholders without their presence as parties to the record." It also held that Phoenix was an ancillary party, stating: "Furthermore if the controversy between the two Delaware corporations should in any way be considered as a separate controversy involving only the validity of certain of the bonds, then it was ancillary to the foreclosure proceeding, and jurisdiction attached irrespective of citizenship, because the subject matter had been drawn into the federal court under the receivership before Phoenix became a party." Phoenix' petition for writ of certiorari was denied. (305 U. S. 650, No. 438, October Term, 1938, under title Phoenix Finance Corporation vs. Iowa-Wisconsin Bridge Company, *et al.*, rehearing denied, 305 U. S. 676.) Thereupon the question of jurisdiction became forever closed and *res judicata*, and not subject to be again presented by Phoenix.

Des Moines Navigation & Railroad Co. v. *Iowa Homestead Co.*, 123 U. S. 552.
Dowell v. *Applegate*, 152 U. S. 327.
Davis v. *Davis*, 305 U. S. 32.
Stoll v. *Gottlieb*, 305 U. S. 165.

The original suit was instituted at the request and instigation of petitioner, Phoenix, and carried on at its expense and under its direction by attorneys of its selection, as is more fully set out in the statement of the case, page 3, *supra.*

Phoenix filed exceptions to the master's report (F.R. Supp. 14). The trustees in their petition for rehearing, which was verified by Thompson of Phoenix, adopted the petition for rehearing of Phoenix (F.R. 214). The trustees and Phoenix appealed to the Circuit Court of Appeals and filed brief and reply brief. Phoenix petitioned this court for writ of certiorari, which was denied.

In *Stoddard* v. *Thompson, et al.,* 31 Iowa 80, at 82, the court said:

> "One who, though not a party, defends or prosecutes an action by employing counsel, paying costs, and by doing those things which are usually done by a party, is bound by the judgment rendered therein."

See also *Schroeder* v. *State Bank,* 144 Iowa 42, 121 N. W. 505.

That the trustees were the agents and representatives of Phoenix also appears from the trust deed by Section 13 (F.R. 33-34), quoted in the opinion of the Circuit Court of Appeals (98 Fed. (2) 416, at 420), and by Section 10, which is set out in the statement of the case at page 4, *supra.*

In the case of *McPherson* v. *Commercial Building & Loan Co.,* 206 Iowa 562, 218 N. W. 306, the question as to the powers of a trustee was passed upon. The court, in discussing the relationship between a trustee, occupying position similar to that of the trustees in this case, and the bondholders, said:

"In the deed of trust set forth in the petition, the trustee was the pledgee of the securities, and was the proper representative of all the bondholders, with full power both under the trust deed and under the statute. Sections 12364-12371, Code 1924. Plaintiff's bond carried the written attestation of the trustee. *There was no lack of privity as between the holder of the bond and such trustee.*" (Emphasis supplied.)

Also see: Section 10968 of the Code of Iowa of 1935. *3.

In the instant case the claimed considerations involved in the Delaware actions and of the mortgage held fraudulent were all put forward as claimed considerations for the bonds and were all fully investigated to the minutest detail, as shown by the opinion of the Circuit Court of Appeals in the first case, 98 Fed. (2) 416, at 421-429.

The case of *Mackay* v. *Randolph Macon Coal Co.* (8 C.C.A. 1910), 178 Fed. 881, cited by petitioner, involved a question of merger, not of *res judicata,* and was decided under the earlier equity rules, which were amended before the original trial of the present case, and that case is not an authority for the proposition for which it is cited by petitioner.

In *Lane* v. *Equitable Trust Co. of N. Y.* (Nov. 24, 1919, 8 C.C.A.), 262 Fed. 918, certiorari denied 252 U. S. 578, 40 S. Ct. 344, 64 L. ed. 625, *wherein the mortgage deed of trust, securing the bonds, contained the same*

*3. Section 10968. "Plaintiff as legal representative. An executor or administrator, a guardian, a trustee of an express trust, a party with whom or in whose name a contract is made for the benefit of another, or party expressly authorized by statute, may sue in his own name, without joining with him the party for whose benefit the action is prosecuted."

provision as those in the instant case, above quoted, "the trustee in a railroad trust deed was held entitled to a deficiency decree under equity rule 10 (198 Fed. xxi, 115 C.C.A. xxi), where the proceeds of the mortgaged property sold under foreclosure decree were insufficient to pay the mortgage debt, and the trust deed expressly authorized the trustee to collect any deficiency in its own name."

See, also:

Fidelity Philadelphia T. Co. v. *Hale-Kilburn Corp.* (1937), 24 Fed. Supp. 3, at 11.
Hartford Acc. Ins. Co. v. *Southern Pac. Co.*, 273 U. S. 207, 47 S. Ct. 357, at 360.

Petitioner cites the case of *Iowa Title & Loan Co.* v. *Clark Bros., et al.*, 213 Iowa 875, 237 N. W. 336. In that case there were a series of notes secured by the same mortgage and the court held that one or more of the note owners might sue and recover at law and later enforce the mortgage lien, while holders of other notes might in the first instance avail themselves of their remedy by foreclosure. But that is not what the petitioner did in the instant case. Here Phoenix procured a fraudulent deed of trust, securing the bonds, and the claimed considerations thereof, covering every item of property owned by the bridge company, adopting that as its weapon. The case does not hold that a person may have trustees proceed with the foreclosure of a mortgage or deed of trust to recover the claimed debt secured thereby, and having been defeated on the ground that there was no consideration and no debt existed, proceed to sue again on the same pretended indebtedness, nor does it hold that a person may sue on notes and having been defeated on the ground that there was no considera-

tion, that he may then sue in the name of trustees for the foreclosure of a mortgage claimed to secure the same notes.

In *Iowa Title & Loan Co.* v. *Clark,* 215 Iowa 929, 247 N. W. 211, in which under a trust agreement giving to the trustee powers similar to but not as elaborately stated as the powers set forth in the trust deed in this case, the trustee brought one action to foreclose a mortgage as to certain of the notes for which the mortgage was security, and an action at law to recover upon the remaining notes. The Iowa court specifically held that the owners of the notes having constituted the plaintiff their trustee to enforce collection of the debt represented by the notes, and the Iowa law (Section 10968, Codes 1927 and 1931), providing that a trustee of an express trust * * * may sue in his own name without joining with him the party for whose benefit the action is prosecuted, the right to prosecute the action on the notes was in the trustee, and stated:

> "Under our statute the plaintiff, as such trustee of an express trust, had authority to bring action against the defendants in its own name without joining with it the beneficial owners of the notes. Aside from its duty as trustee to distribute the proceeds of the trust fund to those entitled thereto, the plaintiff was in no different position than if it were prosecuting this action as the absolute owner of the notes."

Petitioner cites a fraudulent conveyance case, *Clemens* v. *Elder, et al.,* 9 Iowa 272, wherein Elder conveyed lands to James H. Grower and received a bond for the reconveyance of the same upon the payment of $3,750.00 within one year as evidenced by two notes payable to J. H. Grower Bros. & Co., and an action was

brought to set aside this deed as a fraudulent conveyance and it appears that James H. Grower in fact held the title for the firm to which the notes were payable, or their endorsers, or both, none of whom were made parties. The court held the proper parties had not been made defendants. In that case there was no trust deed such as in the instant case authorizing the trustee to represent all parties interested. That case has no similarity in facts to the case at bar and obviously is not an authority for the proposition for which petitioner cites it.

In *Souffront* v. *La Compagnie Des Sucreries, etc.*, 217 U. S. 475, 54 L. ed. 856, 30 S. Ct. 608, 612, this court said:

> "The persons for whose benefit, to the knowledge of the court and of all parties to the record, litigation is being conducted, cannot, in a legal sense, be said to be strangers to the cause. The case is within the principle that one who prosecutes or defends a suit in the name of another, to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own, and who does this openly, to the knowledge of the opposing party, is as much bound by the judgment, and as fully entitled to avail himself of it, as an estoppel against an adversary party, as he would be if he had been a party to the record. *Lovejoy* v. *Murray*, 3 Wall. 1, 18 L. ed. 129."

See:

Anderson v. *Watt*, 138 U. S. 694, 704, 705, 11 S. Ct. 449, 34 L. ed. 1078.
Robbins v. *Chicago City*, 4 Wall. 657, 71 U. S. 657, 672, 18 L. ed. 427.
Lovejoy v. *Murray*, 3 Wall. 1, 70 U. S. 1, 19, 18 L. ed. 129.

Hoskins v. *Hotel Randolph Co.*, 203 Iowa 1152, 211 N. W. 423, 427.
Fulsom v. *Quaker Oil & Gas Co.* (8 C.C.A.), 35 Fed. (2) 84, 90.
Louisville & Nashville Ry. Co. v. *A. L. Schmidt*, 177 U. S. 230, 20 S. Ct. 620.
Freeman on Judgments (5th Ed.), Vol. 1, sec. 430.

In the case of *Kerrison* v. *Stewart*, 3 Otto 155, it was held:

> "Where a trustee represents his beneficiaries in all things relating to the trust property, they are not necessary parties to a suit against him by a stranger *to enforce, or declare void the trust.*"

The court said:

> "In such cases the trustee is in court for and on behalf of the beneficiaries, and they, though not parties, are bound by the judgment, unless it is impeached for fraud or collusion between him and the adverse party. * * * The principle which underlies this has always been applied in proceedings relating to railway mortgages, where a trustee holds the security for the benefit of bondholders. It is not, as seems to be supposed by the counsel for the appellants, a new principle developed by the necessity of that class of cases, but an old one, long in use in analogous circumstances, and found to be well adapted to the protection of the rights of those interested in such securities."

In *Mercantile Trust Co.* v. *Schlafly* (C.C.A. 8), 299 Fed. 202, which was a suit by a trustee in bankruptcy against a trustee under a mortgage securing bonds to recover money collected by defendant for interest on bonds within four months prior to bankruptcy, and not disbursed to the bondholders, it was claimed that the

bondholders were necessary parties. The court held that they were not; that they were all represented by the trustee.

In *Beals* v. *Ill. M. & T. R. R. Co.*, 133 U. S. 290, the court said:

> "Upon the facts thus established no ground is shown for maintaining the bill. The former judgment was rendered by a court of competent jurisdiction, in which not only the railroad company that issued the bonds, but the surviving trustee under the mortgage, made in the name of another company to secure payment of the bonds, were made parties. *The bondholders were thus fully represented in that suit, and bound by the decree cancelling and annulling the bonds and mortgage.*"

In *Elwell* v. *Fosdick*, 134 U. S. 500, where a decree had been entered and a sale made and confirmed in a suit to foreclose a first mortgage on a railroad, in which the trustee under second mortgage was made a party, and a release of errors in the proceeding executed by such trustee, the court said:

> "The trustee represented the bondholders not only in the proceedings which resulted in the entry of the decree, so that the bondholders were not necessary parties, but he bound them by his release of errors."

To the same effect see *Manson* v. *Duncanson*, 166 U. S. 533.

On the issues of fraud, conspiracy, invalidity and want of consideration, Phoenix Finance Corporation, as well as the other bondholders, were represented by the trustees.

In the case of *Richter* v. *Jerome*, 123 U. S. 233, 246, the court said:

> "Something is also said in the argument about the equitable claims of the bondholders upon Ayer as the successor of Anthony, growing out of the false representations made to them as to the title of the lands covered by the mortgage when they paid the money and took the bonds; but as all such claims come from the mortgage, as to which, in all proceedings for foreclosure, they are represented by their trustees when its interests are not in conflict with theirs, all the equities now asserted were proper subjects for adjudication in the former suit, if they existed. They formed part and parcel of the security which was then foreclosed. * * *"

The Delaware Superior Court (a *nisi prius* court), in its opinion, *Phoenix Finance Corporation* v. *Iowa-Wisconsin Bridge Company*, 14 Atl. (2d) 386, cited in petitioner's brief, page 31, overlooked the decision in *Lane* v. *Equitable Trust Company of New York* (8 C.C.A. 262 Fed. 918, certiorari denied, 252 U. S. 578), and the amended rules of this court and the provisions of Sections 10 and 13 of the trust indenture, and misconstrued and failed to follow the decisions of this court.

Point Two and the arguments, citations and quotations from authorities thereunder of petitioner's brief, pages 34, 35, 36, 37, 38 *and* 39, *is a mere copy of petitioner Phoenix' former petition, Point One, pages* 16, 17, 18, 19 *and* 20, *for writ of certiorari, with only a few words changed to give it the appearance of applicability to present petition.*

This was fully answered in respondent's brief on former petition denied by this court. We ask this Honorable Court to take judicial notice of such former petition

and of respondent's brief filed in No. 438, *October Term,* 1938, *entitled Phoenix Finance Corporation, a Delaware corporation, vs. the Iowa-Wisconsin Bridge Company, a Delaware corporation, et al.,* 305 U. S. 650; rehearing denied, 305 (N.S.) 676.

POINT TWO.

The validity of the bonds and the considerations received for them were adjudicated in the foreclosure case, and the decree in that case, affirmed by the Eighth Circuit Court of Appeals, is *res judicata* of the controversies involved in the supplemental and ancillary proceedings.

The argument on this point answers petitioner's argument on its Points 1 and 5, brief pp. 30-34, 44-46.

The application of the doctrine of *res judicata* and determination of what was involved in and adjudicated in the foreclosure case, are governed by the laws of Iowa and the decisions of the courts of Iowa and the federal courts.

Art. 4, Section 1, Constitution of the United States.

Section 905, U. S. Revised Statutes.

Freeman on Judgments (5th Ed.), Vol. 3, Sec. 1386.

Marin v. *Augedahl,* 247 U. S. 142, 62 L. Ed. 1038, 38 S. Ct. 452.

Fauntelroy v. *Lum,* 210 U. S. 230, 52 L. Ed. 1039, 28 S. Ct. 641.

Harding v. *Harding,* 198 U. S. 317, 49 L. Ed. 1086, 25 S. Ct. 679.

Hanley v. *Donoghue,* 116 U. S. 1, 29 L. Ed. 535, 6 S. Ct. 242.

Owsley v. *Central Trust Co.,* 196 Fed. 412.

Carpenter v. *Beal-McDonnell & Co.*, 222 Fed. 453.
Ashby v. *Manley*, 191 Iowa 113, 181 N. W. 869.
Bigelow v. *Old Dominion Copper Mining and Smelting Co.*, 225 U. S. 111, 32 S. Ct. 641-644.
Freeman on Judgments (5th Ed.), Vol. 2, Sec. 1070, pages 3018, 3019.
Pittsburgh C. C. & L. Ry. Co. v. *Long Island L. & Tr. Co.*, 172 U. S. 493, 43 L. Ed. 528, 19 S. Ct. 238.
Thompson v. *Lee County*, 22 Iowa 206.

The question of lack of consideration of the bonds was directly involved in the suit. Every question relating not only to fraud but to consideration was fully tried and fully determined by the court, including the fraudulent procurement of bonds by cancellation of stock. Phoenix participated in the suit and is bound by the determination of the court not only by reason of its being fully represented by the trustees, who brought the action at the instigation of Phoenix and conducted it with counsel of Phoenix selection, but because it was made a party plaintiff and defendant to the petition of intervention, participated in the trial of the action and through the trustees and by itself raised the question of consideration as to the bonds and indebtedness involved in the suits enjoined.

The Circuit Court of Appeals in the first opinion [98 Fed. (2) 416, at 424 (R. 84)] said:

> "The important issue in the case is the question of the sufficiency of the consideration for the $177,000 of bonds issued to Phoenix."

The effect to be given the decree in the foreclosure suit and the identity of the matters alleged in the supple-

mental and ancillary bill with matters adjudicated in the foreclosure action are most clearly set forth in that portion of the opinion of the Circuit Court of Appeals which we attach hereto as an appendix, with appropriate record references (pages 56-67, *infra*).

In addition we present the following:

Under the law of Iowa a judgment on the merits constitutes a complete bar and estoppel between same parties based upon same claim or demand or cause of action not only as to matters in issue, but as to all matters incident to or essentially connected with the subject of the action which might have been put in issue.

Rew v. *School District,* 125 Iowa 28, 98 N. W. 802.

Bagley v. *Bates,* 223 Iowa 836, 273 N. W. 924, at 927.

So. Pacific Ry. Co. v. *U. S.,* 168 U. S. 1, 42 L. ed. 355, 18 S. Ct. 18, 28.

Chicot County Drainage Dist. v. *Baxter State Bank,* 308 U. S. 371, 378, 60 S. Ct. 317.

The doctrine of res judicata does not depend upon affirmance and denial of particular proposition in pleadings of former suit, but upon the fact that proposition has been fully and finally investigated and tried therein and the judgments and orders are res judicata as to all findings or determinations regarding subject matter of suit necessarily implied from final decisions as essential thereto.

King City, Mo., for use and benefit of the United States Cast Iron Pipe & Foundry Co. v. *Southern Surety Co.* (212 Iowa 1230, 238 N. W. 93).

Cromwell v. *County of Sac,* 4 Otto 351, 94 U. S. 351, 532, 24 L. ed. 195.
Baltimore S. S. Co. v. *Phillips,* 274 U. S. 316, 47 S. Ct. 600.
Reynolds v. *Lyon County,* 121 Iowa 733, 96 N. W. 1069, 1099.

The case of *Reynolds, et al.,* v. *Stockton,* 140 U. S. 254, cited by petitioner, bears no similarity to the instant case. The case is similar to the class of cases where the plaintiff by his notice and pleadings asks for certain relief, and then on default or after answer, without further legal notice and without amendment, takes judgment based on different grounds than those alleged and for a wholly different amount in the absence of the defendant. The court in the opinion states:

> "Nor are we concerned with the question as to the rule which obtains in a case in which, while the matter determined was not, in fact, put in issue by the pleadings, it is apparent from the record that the defeated party was present at the trial and actually litigated that matter. * * * Here there was no appearance after the filing of the answer and no participation in the trial or other proceedings."

The courts are not limited to the pleadings and decree to determine what was adjudicated in a former cause.

State of Oklahoma v. *State of Texas,* 256 U. S. 70, 88, 41 S. Ct. 420, 25 L. ed. 831.
National, etc., Co. v. *Oconto,* 183 U. S. 216, 234, 22 S. Ct. 111, 46 L. ed. 157.
34 Corpus Juris, p. 921, Sec. 1329.
Freeman on Judgments, Vol. 2 (5th Ed.), Sec. 772, p. 1642.

As said in Jones on Mortgages, 8th ed., Sec. 316, at p. 289:

> "A debt, either pre-existing or created at the time, or contracted to be created, is an essential requisite of a mortgage. 'A mortgage is, in equity, a hypothecation or pledge of property for the security of a debt. There must be a debt, or there can be no security for its payment. Hence it is said, if there is no debt, there can be no mortgage. Debt, in this connection, means a duty or obligation to pay, for the enforcement of which an action will lie.'"

And in *Carpenter* v. *Longan*, 16 Wall. 271, it is said:

> "Upon bill of foreclosure * * * an account must be taken to ascertain the amount due upon the instrument secured by the mortgage. * * * The note and mortgage are inseparable; the former as essential, the latter as an incident. * * * The mortgage can have no separate existence. When the note is paid the mortgage expires. It cannot survive for a moment the debt which the note represents."

See also:

Ariz. Copper Estate v. *Watts*, 237 F. 585.
Holladay v. *Willis*, 101 Va. 274, 43 S. E. 616.
Saunder v. *Dunn*, 175 Mass. 164, 55 N. E. 893.

The proposition finds another analogy in the law of pledges, which is that there can be no valid pledge of property unless there is a valid debt in existence which is to be secured by the pledged property. If there is no such valid debt then the pledge is invalid.

49 C. J. p. 903, Sec. 23 (Failure of Consideration).
Chapman v. *Sipe Springs First Nat. Bank*, 275 S. W. 498 (Tex.).
Stokes v. *Stokes*, 155 N. Y. 581, 50 N. E. 342.

The case of *Thomas* v. *Brownsville, etc. R. Co.,* 109 U. S. 522, is in point. In that case an action was filed for the foreclosure of an indenture of mortgage securing a bond issue. The bonds themselves were issued on account of a contract for the construction of the railroad. The court found as a fact that the bonds were invalid because the construction contract was fraudulent and therefore void. However, some of the bonds were held to be valid to the extent they could be supported by consideration, resulting from work, labor, and material furnished by the contracting company. But the court pointed out that such partial validity of the bonds was not dependent upon the original obligation—the contract which had been declared void.

This case illustrates the fact that in a suit to foreclose a mortgage securing bonds, the court must inquire into the consideration for the bonds and will, if necessary, void the bonds if they are issued without consideration or on account of void obligations but will enter a decree in the amount of consideration found. Necessarily, in the *Thomas case,* the court had to determine the validity of the underlying obligation.

Speers Sand & Clay Works v. *American Trust Co.,* 20 F. (2d) 333.
Geddes v. *Anaconda Mining Co.,* 254 U. S. 599.
Thompson on Corp., pp. 217-218, Sec. 2289.

In *Deaton* v. *Hollingshead,* 225 Iowa 967, 282 N. W. 329, the court, in discussing the nature of a foreclosure action, said:

> "Code, section 12372, provides that a mortgage of real estate shall be foreclosed by equitable proceedings. Plaintiff in the foreclosure suit selected the equity forum for the adjudication of his rights

and prayed, not only for a money judgment, but also for foreclosure of the mortgage and appointment of a receiver. The court of equity had jurisdiction of the controversy and parties, and the action having been properly brought in equity, all issues, *legal* and *equitable,* are triable therein, and the court will determine the entire controversy." (Emphasis supplied.)

Also see *Camp* v. *Boyd,* 229 U. S. 530, 33 S. Ct. 785, at 793.

"A successful defense on the merits in an action either on the principal debt or the collateral will bar an action on the other." 34 C. J. 853.

Also see:

Chew v. *Brumagen,* 113 Wall. 497, 20 L. Ed. 663.
Johnson v. *Forstall, et al.,* 3 La. Ann. 466 and
Sykes v. *Gerber,* 98 Penn. St. 179.
U. S. v. *California & Oregon Land Co.,* 192 U. S. 355, 24 S. Ct. 266.
Beloit v. *Morgan,* 7 Wall. 619, 19 L. Ed. 205.
Thompson v. *Roberts Bros.,* 24 How. 233.
Kenyon v. *Wilson, The Same,* v. *Baker,* 78 Iowa 408, 43 N. W. 227.
Schroeder v. *Bank,* 144 Iowa 42, 121 N. W. 505.

The Circuit Court of Appeals in that portion of its opinion attached as an appendix (pages 56-67, *infra*) has fully discussed the claims of Phoenix as to the suit for the return of 517 shares of stock.

Petitioner, however, contends in its brief, page 44, that the Delaware Court of Chancery has exclusive jurisdiction to determine the question of return of the stock as being a question of internal management.

Jurisdiction of a foreign corporation having attached by proper service, the question of whether relief relating

to such corporations' internal affairs should be granted, is in no proper sense jurisdictional, but is one of discretion in the exercise of the jurisdiction determined by considerations of convenie ce, expediency, efficacy and justice.

Fletcher Cyc. Corp., (Perm. ed.), Vol. 17, p. 375, Sec. 8427, p. 376.
American Creosote Co. v. *Powell*, 298 Fed. 417, certiorari denied 265 U. S. 595, 68 L. ed. 1198, 44 S. Ct. 638.
Fletcher Cyc. Corp., Vol. 17, Sec. 8429, pp. 385-387.
LaVarre v. *Hall*, 42 Fed. (2) 65.

When a corporation is sued it has a right to defend the suit on all proper grounds.

See Fletcher Cyc. Corp., Vol. 18, Sec. 8672, p. 242.
Burnrite Coal Briquette Co. v. *Riggs, et al.*, 274 U. S. 208, 47 S. Ct. 578.

No question of internal management was presented in the original case and none can be presented now.

To say that the perpetration of a fraud on a corporation by obtaining bonds from it in exchange for shares of stock, is a matter of internal management and that a court dealing with the entire fraudulent conspiracy of which it is but a part, may not deal therewith, is too shocking for consideration.

Petitioner studiously refrains from referring to the findings of fraud with respect to the stock and its petition for the rehearing and modification of decree to have it withheld from adjudication, and the answer thereto that the stock was surrendered as a part of a fraudulent scheme, plan and conspiracy in procuring bonds (F.R. 180-181, 200-201, 223, 398, court's opinion F.R. 413).

POINT THREE.

The injunction is not a violation of Section 265 of the Judicial Code or of the Fifth Amendment to the Constitution.

This point answers petitioner's propositions 3 and 4, pp. 39-43.

The Circuit Court of Appeals, in its opinion, states (R. 782; 115 Fed. (2d) 1, at 10):

> "It is claimed on this appeal that the injunction granted is in violation of Section 265 of the Judicial Code and that it results in a denial of the rights of Phoenix guaranteed by the Fifth Amendment to the Constitution. These contentions may be considered together because unless the decree violates Section 265 it does not deprive Phoenix of any of its constitutional rights."

This court in its opinion in *Local Loan Company* v. *Hunt*, 292 U. S. 234, 54 S. Ct. Rep. 695, 697, stated:

> "That a federal court of equity has jurisdiction of a bill ancillary to an original case or proceeding in the same court, whether at law or in equity, to secure or preserve the fruits and advantages of a judgment or decree rendered therein, is well settled. (Citing authorities.) • • • The proceeding being ancillary and dependent, the jurisdiction of the court follows that of the original cause, and may be maintained without regard to the citizenship of the parties or the amount involved, and notwithstanding the provisions of Sec. 265 of the Judicial Code, U.S.C., Title 28, Sec. 379." (Citing authorities.)

The case of *Oklahoma Packing Company* v. *Oklahoma Gas & Electric Co.*, 309 U. S. 4, 60 S. Ct. 215, 84 L. Ed. 329, cited by petitioner at page 42 of its brief, is not in point. It is not similar to the instant case.

in that it was not an action to preserve the fruits of the previous orders and decrees of a federal court, but was purely and simply a suit to stay proceedings in a state court which originally had jurisdiction of the matter involved.

The opinion in *Guardian Trust Company* v. *Kansas City Southern Railway Company* (C.C.A. 8), 171 Fed. 43, cited by petitioner when read in its entirety is in harmony with the later decisions of that court.

The case of *Toucey* v. *New York Life Ins. Co.* (C.C.A. 8), 102 Fed. (2d) 16, reviews the authorities, and the language of the court in that case is particularly appropriate. In that case it was claimed by the appellant that the jurisdiction of the federal equity court in the equity suit which appellant had brought against the insurance company was grounded upon fraud of the insurance company, and that the claim he made in that suit for recovery upon the disability provisions of his original policy presented merely a dependent legal issue, and that when the court decided against him upon the issue of the fraud, it lost jurisdiction to proceed further or to make determination upon the alleged dependent legal issue. After a complete discussion of the case, the court held that while the claim of appellant for recovery of disability payments was dependent upon his establishing his right to a reinstatement of the policy, which he claimed had been altered and reduced through fraud:

> "But both of those claims were asserted and in controversy before it and the court of equity was called to decide upon both controversies. It did consider the evidence on both issues, and we are cited to no case implying that a court of equity lacks power to fully and finally adjudicate all equitable

> controversies presented by the pleadings and the evidence in a case within its jurisdiction. Its adjudication on each claim in controversy was equally conclusive and binding upon Mr. Toucey. * * *
>
> "The power and duty of the federal courts to effectuate their decrees and judgments and protect the fruits thereof upon supplemental bills are fully established and exemplified in the following cases, among others" (citing numerous cases).

In view of the decision in the Toucey case and the authorities cited in that and *Hasselberg* v. *Aetna Life Ins. Co.* (8 C.C.A.), 102 Fed. (2) 23, in which the leading authorities are fully reviewed, there can be no question as to appellee's right to injunctive relief.

Some of the principal cases upholding the right of the court to act under similar circumstances are:

Root v. *Woolworth,* 150 U. S. 401, 14 S. Ct. 136.
Hickey v. *Johnson* (C.C.A. 8), 9 Fed. (2d) 498, reviewing all authorities to that date.
Swift v. *Black Panther* (C.C.A. 8), 244 Fed. 20.
Phipps v. *C. R. I. & P. Ry.* (C.C.A. 8), 284 Fed. 945.
Nilson v. *Alexander* (C.C.A. 5), 276 Fed. 875.

In the last cited case it is specifically held, although there should be no question as to the proposition, that the right to plead the decree of the federal court in the state court is no reason why resort should not be had to the equitable jurisdiction of the federal court.

In petitioner's brief, at page 42, it is stated that none of the exceptions stated in *Equitable Life Assr. Society* v. *Wert* (8 C.C.A.), 102 Fed. (2) 10-14, are applicable to the facts here. The court there said:

"The several classes of cases in which such injunctions may be granted consistently with the provisions of Sec. 265 may be roughly classified as follows: * * *.

"3. Proceedings *in personam* in a state court, when the federal court has acquired jurisdiction of a suit *in personam* involving the same subject-matter, based upon some well recognized equitable ground, and where the effect of the state court proceedings would necessarily be to defeat or impair the jurisdiction of the federal court" (citing cases). * * *. "An inadequacy of legal remedy exists where one is bound to litigate a multiplicity of suits having a community of facts and issues" (citing cases). "Avoidance of the burden of numerous suits at law between the same or different parties, where the issues are substantially the same, is a recognized ground for equitable relief in the federal courts" (citing cases).

In the instant case, after the rendition of the decision of the Eighth Circuit Court of Appeals on the 8th day of August, 1938, Phoenix, although filing a petition for writ of certiorari in this court, commenced the filing of various suits in Delaware to have retried piece-meal the various matters which had been determined in the foreclosure proceeding, one after the other.

The respondent filed the supplemental and ancillary bill herein on the 18th day of September, 1939, and on the 28th day of September, 1939, hearing was had on motion for temporary writ of injunction, Phoenix appearing by its attorney, and such temporary injunction was granted (R. 118, 132-140). To re-try the matters which were disposed of in the foreclosure action in the various suits in Delaware and to defend those actions in trial and appellate courts would obviously require respondent

to litigate a multiplicity of suits and impose upon it a tremendous expense.

This cause on supplemental and ancillary bill was heard and submitted on the 11th day of March, 1940, Phoenix appearing by its attorney at such hearing (R. 257-293). No opinion was filed in the one Delaware case tried until March 18, 1940. (See 14 Atl. (2) 386.)

By the terms of the decree Phoenix is required to dismiss all the Delaware cases at its own cost (R. 722). By the terms of the supersedeas bond filed after appeal to the Circuit Court of Appeals, it is not required to dismiss any of the pending suits immediately, but is to satisfy any judgment theretofore entered by any state court in Delaware, or which might thereafter be entered in violation of the final decree entered on the supplemental complaint in case of the affirmance of the final decree by the Circuit Court of Appeals or Supreme Court of the United States in case of certiorari.

POINT FOUR.

The burden was not upon the respondent to show that the decree in the foreclosure case was a "right" one and not obtained by fraud.

This point answers petitioner's argument on its Points 6, 7 and 8, brief, pages 46 to 55.

Petitioner opens its argument on this proposition by stating that the supplemental and ancillary bill seeks to enjoin Phoenix from asserting "bona fide" claims and that these claims are a part of a general account set out by an exhibit rejected by the court.

A similar report was attached to the exceptions by Phoenix to the master's report (F.R. Supp. 22, 23). In

its petition for rehearing Phoenix claimed advances of a different amount by a similar report of the same accountants (F.R. 308-324). These claims were effectually disposed of both by the district court (F.R. 176-177) and by the Circuit Court of Appeals (R. 88, 89, 98 Fed. (2) 416, at 426) as being wholly without foundation.

Phoenix having committed the most aggravated fraud against the bridge company, and having put the bridge company to enormous expense extricating itself from such situation, now having granted itself absolution from its fraudulent conduct, presumes to come back to the same court to assert that it is there with clean hands and that its victim is the one whose hands are unclean, and that therefore this case ought to be retried.

As stated by the court below, in discussing the cases cited by petitioner: "These authorities fall far short of supporting the contention of Phoenix. They place no such burden upon the victim of a wrongdoer when he attempts to secure the fruits of a former judgment against such wrongdoer. * * * The rule is applied generally for the protection of innocent parties and not for the benefit of parties whose hands were found to be unclean in the first suit." (R. 783; 115 Fed. (2) 1, at 10-11.)

Most of the cases cited in the brief of Phoenix are cited in 34 Corpus Juris 779, Section 1198, under the heading "Judgments by Consent," Note 9, among which is *Lawrence Mfg. Co.* v. *Janesville Cotton Mills Co.*, 138 U. S. 552, containing the language: "The prior decree was the consequence of consent, and not of the judgment or decree, and, this being so, the court had the right to decline to treat it as *res adjudicata.*"

The case of *Union Central Life Insurance Co.* v. *Drake* (8 C.C.A.), 214 Fed. 536, is not similar. That was a second and independent suit and not an ancillary bill to preserve the fruits of the original decree. The court held that when the second suit is upon a different cause of action and between the same parties as the first, the judgment in the former is conclusive in the latter, as to each question which was or might have been presented and determined in the former.

"Lord Resdale's Rule" is applicable only in cases where a party is seeking to modify or enlarge an incomplete decree and then to enforce it. (See cases cited by court below, 115 Fed. (2) 1, at 11, R. 783-787.)

As stated in *Utah Power & Light Co.* v. *U. S.* (Court of Claims), 42 Fed. (2) 304, at 308:

> "In *Lawrence Mfg. Co.* v. *Janesville Mills,* 138 U. S. 552, 11 S. Ct. 402, 405, 34 L. ed. 1005, the plaintiff sought to have a former consent decree extended and then enforced and the court said:
>
> "'But where a party returns to a court of chancery to obtain its aid in executing a former decree, it is at the risk of opening up such decree as respects the relief to be granted on the new bill.'
>
> "Accordingly, the court held that it was at liberty to inquire whether circumstances justified the relief asked, and, the former decree having been entered by consent, the court had the right to decline to treat it as *res adjudicata. But in the case at bar no modification of the former decree is sought, the plaintiff stands on the decree as it is, and the case is not one in which a new trial of the former action can be had."* (Emphasis supplied.)

Petitioner claims that the scope of the decree is exceedingly narrow. The rule is well settled that "what was involved and determined in the former suit is to be tested by an examination of the record and proceedings, the evidence submitted, the respective contentions of the parties, and the findings and opinion of the court." *State of Oklahoma* v. *State of Texas*, 256 U. S. 70, at 88, 41 S. Ct. 420, at 423.

Petitioner's assertion that the mortgage held fraudulent was an "open" mortgage securing a total obligation of $59,000 is wholly without merit. The pretended mortgage was adjudicated fraudulent and wholly without consideration. The $9,000 item was asserted in the trial as an alleged additional consideration for $97,000 in bonds. The mortgage having its inception in fraud was a dead instrument from the day of its execution, and was so found by the court, and petitioner cannot now infuse it with life.

The record in this case shows that the court specifically found that the $50,000 mortgage was without consideration, fraudulent and void (F.R. 191-192). Phoenix asked that the decree be modified so as to withhold from adjudication the question of validity of said mortgage (F.R. 223), which motion was denied, and Phoenix assigned as error on the original appeal the findings of the court as to the $50,000 mortgage (F.R. 511), as further error the court's denial of the petition that the decree be modified so as to withhold from adjudication such mortgage (F.R. 526), and as further error the court's failure to adjudge and decree that all of the bonds issued to Phoenix Finance System, Inc. (which included the bonds issued for the purported consideration of the mortgage) were valid (F.R. 526).

Under the circumstances there can be no question that the mortgage was fully disposed of by the decree. Petitioner now seeks to assert that the note for $50,000 was not an exhibit in the foreclosure cause, and that because the present decree directs Phoenix to deliver up for cancellation that note, there is necessarily an enlargement and "piecing out" of the original decree. As stated by the court below in that portion of the opinion printed as an appendix: "It is not claimed that there was a different consideration for the note than the consideration for the mortgage, which was held to be fraudulent and non-existent. There can be no merit in such a contention. The entire transaction was decreed to be fraudulent and without consideration. The decree is conclusive."

In connection with this claim, the following language from *Toucey* v. *New York Life Insurance Co.* (8 C.C.A.), 102 Fed. (2) 16, at 20), is most appropriate:

> "The federal court had heard the evidence and determined that Mr. Toucey has no rightful claim against the insurance company on account of the life insurance policy which he had sought to have reinstated and the court's final decree to that effect had been duly entered. *If any necessity had been anticipated the federal court would doubtless have gone through the formality coincident with the decree of ordering Mr. Toucey to bring the policy into court for physical destruction* by the marshal and would have admonished Mr. Toucey by appropriate writ or order to assert no claims under it" (emphasis supplied).

So the court would, if any necessity had been anticipated, have gone through the formality of having the note and mortgage brought into court and delivered up for cancellation.

Petitioner urges that there was no issue in the foreclosure cause as to the right of Phoenix to recover the 517 shares of bridge company's stock delivered to the bridge company in exchange for bonds. This statement is erroneous and not supported by the record.

The petition of intervention as amended, alleged in substance that John A. Thompson and others of Phoenix Finance System, Inc., acting in concert and as parties of a common scheme, plan and conspiracy to cheat and defraud the defendant corporation and its stockholders, and with intent to cheat and defraud said defendant corporation and its stockholders while controlling the board of directors of the defendant corporation, so manipulated the affairs of said company as to issue and deliver to Phoenix Finance System, Inc., $60,500 of bonds in exchange for 517 shares of its preferred stock. That in such transaction the parties of said plan and scheme, owning and controlling Phoenix Finance System, Inc., and controlling the defendant corporation, acted for the defendant corporation in a matter in which the interests of said corporations were adverse.

Phoenix in its answer denied the allegations of the petition of intervention and placed them in issue and prayed for general equitable relief (F.R. pp. 91-92). The trustees filed a reply denying the allegations of the petition of intervention (F.R. 102-103). The order of reference directed the master to report "whether the evidence and the pleadings entitled complainants or the other parties herein to the relief, or any part thereof, prayed in their respective pleadings" (F.R. p. 108).

The master found that the exchange of stock for bonds was done in carrying out a fraudulent conspiracy and that the transaction was fraudulent, *ultra vires*, il-

legal and void. (Master's findings 5, 6, and 7; F.R. pp. 129-130; 136-137).

The court made findings that the stock was surrendered and cancelled at the time Phoenix fraudulently procured the bonds and found that it was done as a part of a fraudulent conspiracy to acquire the ownership of the bridge, to the exclusion of the bridge company and its other stockholders. (F.R. p. 180, Findings 6 and 7; F.R. pp. 196-199, Findings 35, 36, 37; F.R. pp. 200, 201. Finding 39. See court's opinion, F.R. p. 157.) The court in its decree did not direct that the stock be returned to Phoenix (F.R. pp. 202-204).

Phoenix, recognizing that the issue as to the right to return of the stock had been adjudicated, filed its petition for rehearing and modification of decree and in it asserted: "As further ground for the relief herein prayed, Phoenix Finance Corporation shows to the court that through inadvertence, oversight or misapprehension of the facts in this case, the court invalidated $60,500 of bridge company bonds held by Phoenix Finance Corporation for which the last named company surrendered to the bridge company 517 shares of its capital stock, which was the admitted property of Phoenix at the time, and the court has wholly failed to reinvest Phoenix with this stock, but, on the contrary, has not alone invalidated the bonds but deprived Phoenix of the capital stock which it surrendered therefor" (F.R. p. 222). And prayed, among other things:

> "Third. In case rehearing is denied, the decree be so modified as to reinvest in petitioner 517 shares of 'A' stock surrendered in exchange for bonds" (F.R. p. 223).

The allegations and prayer of the petition for rehearing and modification of decree were placed in issue by the answer of defendant and interveners thereto, alleging that "the 517 shares of capital stock surrendered to the bridge company were so turned over as a part of the fraudulent scheme, plan and conspiracy and to fraudulently procure from the bridge company $60,500 of bonds fraudulently issued, and that such transactions were but part and parcel of the fraudulent scheme, plan and conspiracy, and that the complainants are not entitled to have the * * * stock returned. That money or property used to perpetrate a fraud cannot be recovered" (F.R. p. 398).

The trial court denied this petition, finding that the stock had been used as an instrumentality of fraud (F. R. p. 413).

Phoenix on appeal to the Circuit Court of Appeals, by its assignment of errors again presented the question of its right to said stock. (Assignments of error 10, 44, F.R. pp. 510, 522, 523, and especially assignment 62, p. 527.)

The Circuit Court of Appeals overruled such assignments and held that Phoenix was not entitled to the return of the stock. (98 Fed. (2) 416 at 428; F.R. Vol. VI, p. 1707.)

The Delaware case is in chancery and in it Phoenix asks for the same thing, the reissuance of said 517 shares of stock, based on the same identical transaction which was before the federal court when such relief was denied. There was only one transaction in which the bridge company issued $60,500 of bonds in connection with the cancellation of 517 shares of stock, and that is

the one which was involved in this case as a part of the fradulent conspiracy and the one in which the stock was cancelled while Phoenix was fraudulently obtaining the bonds. That matter has been fully determined by the trial court and the Circuit Court of Appeals. (Exhibit SC-2, R. pp. 301-307; trial court's opinion F. R. pp. 156-179; court's findings, F.R. pp. 180-202; Court's opinion, F.R. pp. 411-413; F.R. pp. 981, 982; F.R. bottom p. 541.)

U. S. v. *California and O. Land Co.*, 192 U. S. 355, 24 S. Ct. 266.

A final joinder by issue is not always essential, nor does it matter that the question decided in the prior case was purely one of law, nor that the decision was upon a motion or demurrer provided the issues were involved and were decided and that the order or decision of the court was final. *Spencer* v. *Watkins* (C.C.A. 8), 169 Fed. 379, cert. denied 215 U. S. 605.

Phoenix' allegations of alleged counterclaim were properly stricken. It was merely an attempt to plead claims on its part that had been held by the decree to be non-existent. *Ashby* v. *Manley*, 191 Iowa 113, 116, 181 N. W. 869, 871.

Petitioner's claim of fraud has been fully discussed in the statement of facts (pages 19-21, *supra*).

See *Graves* v. *Graves*, 132 Iowa 199, 204, 109 N. W. 707; *Abell* v. *Partello*, 202 Iowa 1236, 211 N. W. 868.

In *Southern Pacific R. Co., et al.* v. *U. S.*, 168 U. S. 1, 18 S. Ct. 18, 27, the court said:

> "Whatever is new in the evidence now before us touching that matter, is simply cumulative on the

one side or the other. The application to consider that evidence is practically an application for a rehearing as to things directly determined in the former suits between the same parties, and which adjudication has never been modified. Such a course of procedure is wholly inadmissible under the settled rules of *res adjudicata.*"

Also see:

U. S. v. *Throckmorton,* 8 Otto 61-71, 25 L. ed. 93.

Deposit Bank of Frankfort v. *Board of Councilmen of the City of Frankfort,* 191 U. S. 499, 24 S. Ct. 154, at 159.

Rew v. *School District,* 125 Iowa 28, 98 N. W. 802.

King City, etc. v. *Southern Surety Co.,* 212 Iowa 1230, 238 N. W. 93.

Conclusion.

The facts of the identity of the matters involved in the Delaware actions and of the mortgage with those involved in the original determination of this cause have been found by the District Court, and such findings on appeal affirmed by the Circuit Court of Appeals.

The case was carefully reviewed by the Circuit Court of Appeals. The decision does not conflict with the decisions of another Circuit Court of Appeals. It is in conformity with the local decisions of the Iowa Supreme Court and with the decisions of this court. The questions presented have been previously determined by this Honorable Court and the petition presents no question of general importance. There has been no departure from the ac-

cepted and usual course of judicial procedure which calls for an exercise of this court's power of supervision.

We therefore respectfully submit that the petition for writ of certiorari should be denied.

FRED A. ONTJES,
WM. C. GREEN,
Counsel for Respondent.

APPENDIX.

That portion of the opinion below as to the effect to be given the decree in the foreclosure suit, and setting out matters involved in supplemental and ancillary proceedings, with appropriate record references.

"2. The dispute next turns upon the effect to be given the decree in the foreclosure suit. In considering this issue it should be observed that it has long been the rule in the national courts 'that a former judgment between the same parties (or their privies) upon the same cause of action as that stated in the second case constitutes an absolute bar to the prosecution of the second action, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' *Werlein* v. *New Orleans*, 177 U. S. 390, 397; *Chicot County Drainage Dist.* v. *Baxter State Bank*, 309 U. S. 371, 378; *Davis* v. *Brown*, 94 U. S. 423. It is only when a suit is upon a different cause of action, but between the same parties, 'that a judgment in the former action operates as an estoppel in the latter only as to every point and question which was actually litigated and determined and is not conclusive as to other matters which might have been, but were not litigated or decided. *Union Central Life Ins. Co.* v. *Drake*, 8 Cir., 214 F. 536-542; *Cromwell* v. *County of Sac*, 94 U. S. 351. These rules have been consistently followed by this court. See *Handlan* v. *Walker*, 8 Cir., 200 F. 566, 568; *Dickinson* v. *Orr*, 8 Cir., 94 F. (2d) 536, 539; *Guettel* v. *United States*, 8 Cir., 95 F. (2d) 293; *Badger Dome Oil Co.* v. *Hallam*, 8 Cir., 99 F. (2d) 293, 296; *George H. Lee* v. *Federal Trade Commission*, 8 Cir., 113 F. (2d) 583, 585.

In this case the parties are the same. The only question relates to whether the matters and things litigated are the same. In the case of *Toucey* v. *New York Life Insurance Co.*, 8 Cir., 102 F. (2d) 16, 20, we said: 'But although the methods of presenting and determining controversies and the facts on which they arise may sometimes differ in equity and in law, so long as the identity of the controversies can be discerned, the adjudication in one court concludes them.' And in *Union Central Life Ins. Co.* v. *Drake, supra,* this court said, 'The true test of the identity of causes of action is the identity of the facts essential to maintain them.'

It is necessary, therefore, to define the issues tried and determined in the foreclosure suit in order to determine whether the controversies pleaded in the supplemental and ancillary bill can be identified with the controversies adjudicated in the foreclosure decree.

It is urged that in a foreclosure suit the validity of the trust deed only is in issue and the validity of the bonds and the consideration given for them, or the question of fraud inhering in them, are to be determined in a subsequent proceeding. The short answer is that the trustees and Phoenix as well as the bridge company elected to litigate all these matters in the foreclosure proceedings, and having done so all parties are bound by the scope of that decree.

It is well settled that in the foreclosure of a mortgage or deed of trust two issues are usually tendered by the plaintiff. First he asks for the foreclosure of the mortgage lien and the sale of the security and, second, he asks to have the amount of the secured debt established and for a deficiency judgment. The first is an equitable issue and the second a legal one, but the

court of equity having taken jurisdiction determines them both. In the foreclosure suit here involved the trustees, acting under the authority expressly conferred upon them by the trust deed (F.R. 41-44), selected a court of equity and therein demanded both remedies (F.R. 10-11). The answer (F.R. 62-66) and the petition of intervention (F.R. 73-83, 100-102) traversed both issues, alleging as to both the trust deed and the bonds that they were fraudulently issued. The petition of intervention was more specific and pointed out the nature of the fraud. It alleged that Phoenix and the bridge company were dominated and controlled by the same officers; that those common officers in violation of their fiduciary duties to the bridge company fraudulently issued the trust deed and the bonds to themselves or to corporations controlled by them for the purpose in brief of fraudulently obtaining ownership of the bridge company's property without consideration. Phoenix denied these allegations (F.R. 91-92).

Upon the issues thus joined the burden was on the interveners and the bridge company to show such domination and common control. This having been done the burden then rested upon Phoenix, holder of the bonds, and the trustees to show entire fairness in the transaction, including a fair consideration for the bonds. *Geddes* v. *Anaconda Mining Co.*, 254 U. S. 590, 599. It was upon these issues that the case was tried, and Phoenix, as owner of nearly all the bonds, and its officers and attorneys took an active part. (F.R. 531, 238-564, 633-692; F.R. Supp. 14-58; F.R. 204-205, 206-291.) Had they been able in that suit to show that a fair consideration had been paid for the bonds and that the bridge company had had the benefit of such considera-

tion all other elements of fraud would have been comparatively trivial. As said in the opinion of this court on the appeal in the foreclosure suit, 'The important issue in the case is the question of the sufficiency of the consideration for the $177,600 of bonds issued to Phoenix' (R. 84). A mass of evidence was introduced upon that issue, and the court found against Phoenix, declared its bonds invalid and without consideration, and denied foreclosure. In our opinion on the first appeal (R. 83-84) we summarized the consideration claimed by Phoenix and the trustees to have been paid for the bonds as follows, and it will be found convenient for reference in considering the issue of res judicata here:

To Phoenix in consideration of		
1. In exchange for its mortgage dated March 10, 1931	$50,000.00	
Principal of mortgage	3,548.56	
Accrued interest		
Allowance to give 6% yield on bonds	12,727.31	
		$ 66,275.87
2. For advancements under guaranty contract of November 10, 1930,		
To Industrial Contracting Co.	10,000.00	
To McClintic-Marshall Co.	11,262.71	
		21,262.71
3. Paid Kramer & Hogg to discharge mechanic's lien		9,000.00
4. Cash		461.42

5. In exchange for 517 shares of bridge company stock with accrued interest		60,500.00
6. As security for		
Payment of taxes	3,125.00	
Advancements	14,610.19	
	17,735.19	20,100.00
To attorneys as security for fee of	4,000.00	10,000.00
To Anderson for claim of	6,000.00	7,400.00
To five claimants for	5,000.00	5,000.00
	15,000.00	200,000.00

(Exhibits B-27 and B-28 (H.E.B.) F.R. 827-829; offered F.R. 562; F.R. 541-542; 979-982; F.R. Supp. 27, 48-51.)

With the foregoing rules and the situation described in mind we turn to the controversies alleged in the supplemental and ancillary bill to determine whether or not they may be identified with the facts which were or which might have been adjudicated in the foreclosure decree.

(a) In the supplemental and ancillary bill it is charged (R. 5-6), and the answer admits (R. 148), that in Sept., 1938, Phoenix filed an action in Superior Court of Delaware against the bridge company in which the alleged cause of action is based upon two promissory notes, one for $2,000.00 dated December 15, 1932, and one for $3,125.00 dated January 20, 1933 (Ex. SC-1, R. 294-301, especially 298-299; offered R. 266); and the bridge company claims that these notes were involved in and were adjudicated in the foreclosure suit.

The record in the foreclosure suit shows that the $2,000.00 note was a part of the sum of $14,610.19 designated as 'Advancements' in item 6 of the foregoing summary, and that the $3,125.00 note is the same as the first entry of item 6, referred to as 'payment of taxes.' For the total alleged indebtedness under item 6 in the amount of $17,735.19 bonds in the sum of $20,100.00 were issued to Phoenix (F.R. Supp. 48-51). All the claims included in item 6 were considered in the master's report (F.R. 133-134) to which exceptions were filed by Phoenix (F.R. Supp. 14-58), the bridge company and the interveners (F.R. 150-155). The court considered all the exceptions filed by all the parties (F. R. 164-179) and decreed 'that all bonds are without consideration, except the bonds aggregating $15,000.00 referred to hereafter' (F.R. 203-204).

Phoenix contends that the decree is wrong with respect to these items, that the record shows that the sums of $3,125.00 and $2,000 were actually advanced to the bridge company, and that the court without the pleading of a counterclaim or off-set balanced against them $14,000 which Phoenix owed the bridge company for stock fraudulently issued to and held by Phoenix. The claims urged here were all asserted in the foreclosure suit without avail and upon appeal to this court the decree was affirmed. The merits of that controversy can not be reexamined in this collateral attack upon the decree. *Root* v. *Woolworth,* 150 U. S. 401, 414. The adjudication is final and conclusive.

A similar contention was presented to this court in the case of *Thornton* v. *Carter,* 8 Cir. 109 F. (2d) 316, and we there said, at page 320 of the report, citing numerous authorities, that "If a judgment or decree of this

court which disposes of a case on the merits has become final, no purpose can be served by considering whether it is right or wrong. A judgment which is wrong, but unreversed, is as effective as a judgment which is right." In *Cooper* v. *Reynolds*, 10 Wall. 308, 77 U. S. 308, the Supreme Court said: "It is of no avail—to show that there are errors in the record (in a former suit), unless they be such as to prove that the court had no jurisdiction of the case, or that the judgment rendered was beyond its power. This principle * * * takes rank as an action of the law." See also *Manson* v. *Duncanson*, 166 U. S. 533, 547.

(b) It is next charged (R. 6) that in February, 1939, Phoenix commenced a suit against the bridge company in the Court of Chancery of Delaware seeking to recover 517 shares of stock of the bridge company which were surrendered and cancelled at the time Phoenix fraudulently procured the issuance to it of $60,500 of bonds (referred to as item 5 in the foregoing summary), which shares the court in the foreclosure suit found and decreed Phoenix was not entitled to have reissued to it (Ex. S. C. 2, R. 301-307, offered R. 267). Phoenix admits the commencement of such a suit but contends that there was no issue in the foreclosure suit as to the right of Phoenix to get back the 517 shares of stock (R. 149).

In the foreclosure suit it was found that the entire transaction involving the exchange of 517 shares of stock for bonds was fraudulent (F.R. 180-181, 201). After the decree in that case was rendered Phoenix filed a petition for rehearing and modification of the decree in which it prayed that the decree be so modified as to reinvest in it the 517 shares of stock (F.R. 223). (See F.R. 398.) The

court denied the petition (F.R. 411-413), and this court affirmed (R. 91-93).

In the opinion of this court (98 F. (2d) at p. 428, R. 92), we said with reference to this matter, 'In refusing to modify the decree to require the bridge company to return to Phoenix 517 shares of stock surrendered in exchange for bonds the court invoked the maxim that "He who hath done iniquity shall not have equity." * * * In the present case the district court adopted the view that all of the transactions leading up to the issuance of the bonds were steps in a single fraudulent enterprise to obtain ownership of the bridge after a foreclosure, * * * Having determined that the appellants had no standing to maintain their suit, the district court had neither the right nor the duty to compel the bridge company to restore what it had received from the bondholders. This is not a case in which the defrauded party is suing to rescind. Here the fraud had been pleaded only as a defense. * * * when the wrongdoer as plaintiff is attempting to enforce the tainted contract he is turned out of court empty handed.' Citing authorities.

The question for determination is whether the denial of a restoration under the 'clean hands doctrine' by a court having jurisdiction is *res judicata* or whether the wrongdoer may in a separate suit go into another court and recover the property used by him in perpetrating the fraud denounced by the court which denied restoration. If he may do so it would seem that the clean hands doctrine is only a bother, putting litigants to such useless trouble and expense. No authority has been cited to sustain such a practice. In *Root* v. *Woolworth, supra,* the Supreme Court said, 'The jurisdiction of courts of equity to interfere and effectuate their own decrees by injunc-

tions or writs of assistance in order to void the relitigation of questions once settled between the same parties is well settled.' One who fraudulently procures a conveyance may not defeat the defrauded grantor, nor protect himself from the consequences of his fraud, by bringing a suit for restoration in another jurisdiction from the one in which his fraud was adjudged. He is concluded by the first judgment. *Independent Coal & Coke Co.* v. *U. S.*, 274 U. S. 640.

(c) In June, 1939, Phoenix brought another action in the Superior Court of Delaware against the bridge company upon a promissory note for $500.00 and another note for $12,110.19, and also upon two claims, one for $15,000.00 and one for $7,000.00 (R. 6-7, 98; Ex. S. C. 3, R. 307-319, especially 316-317; offered R. 267). The two notes formed part of the alleged consideration for the issuance of $20,100.00 of bonds, referred to in item six of the foregoing summary (F.R. Supp. 48-51). They are governed by the considerations discussed in paragraph (a) above. The claim for $15,000 is a mere restatement of the claim on the notes in different form and in the alternative. The claim for $7000 is a claim for interest on the notes (R. 149). All these claims are sufficiently identified with the controversy adjudged in the foreclosure suit. The decree in that suit concludes them all.

(d) In June, 1939, Phoenix brought another suit against the bridge company in the Superior Court of Delaware for $21,262.71, based upon a guaranty agreement dated November 10, 1930. (R. 7, 98-99; 149-150, Ex. S. C. 4, R. 320-339, especially 336-338; offered R. 267.) This claim is scheduled under item 2 in the foregoing summary. It is made up of the same items. They were

considered in the foreclosure suit and the court found the guaranty agreement to be without consideration, fraudulent and void. The court found that the claimed advancement for the bridge company had not been made by Phoenix. (F.R. 189-191, 192, 193, 194, 196, 201-202, 1393-1395.) Clearly, these claims were litigated in the foreclosure suit, and that judgment is conclusive upon the parties.

(e) Another suit in the Delaware court brought by Phoenix against the bridge company is based upon two bonds of the face value of $500.00 each (R. 7-99). It is admitted that these bonds are a part of those issued to Anderson (referred to in the foregoing summary) in the total amount of $7,400.00 for a debt of $6,000.00 (R. 150). The court below in the foreclosure suit found that they were valid to the extent of the consideration paid for them by Anderson and invalid for in excess of that amount. Payment of the amount found to be due was ordered (F.R. 204).

The issuance of these bonds was a part of the entire fraudulent scheme to which the officers of Phoenix were parties. They can be paid only in the manner provided in the decree in the foreclosure suit. Equity will follow them until they come into the hands of an innocent purchaser for value. Even then the wrongdoer could not acquire them free from the obligation imposed upon them by the court. Phoenix having been a party to the fraud cannot be an innocent purchaser for value no matter when it acquired title. *Independent Coal & Coke Co.* v. *United States, supra,* at page 647. The adjudication is binding upon it.

(f) Item 1 of the foregoing summary shows that upon the trial of the foreclosure suit Phoenix accounted for $66,275.87 of the consideration claimed to have been given for the bonds of the bridge company issued to it by an exchange of bonds for a mortgage on the property of the bridge company dated March 10, 1931, in the principal amount of $50,000.00 and accrued interest and allowance to give an 8% yield on the bonds.

After hearing and considering the evidence in respect to this mortgage the court below in the foreclosure suit found that it was fraudulently issued: 'That in truth and in fact no indebtedness of said bridge company to Phoenix Finance System, Inc., existed and the bridge company received no consideration for the execution of said mortgage; that the same was and is wholly without consideration fraudulent and void. At said time (March 10, 1931), said Thompson caused entries to be made on the books of said bridge company purporting to show receipt of $50,000 in cash, whereas, in truth and in fact, said amount and no part thereof was received by the bridge company' (F.R. 191-192). (See also F.R. 181, 201-202.)

In its petition for a rehearing or in the alternative for a modification of the decree, Phoenix prayed 'that the decree be modified so as to withhold from adjudication the question of the validity of the $50,000 mortgage given by the bridge company to petitioner, reserving the right to petitioner to litigate said mortgage in another action, if it so desires' (F.R. 223). The petition was denied (F.R. 411-413) and this court affirmed (R. 91-92).

In the supplemental and ancillary bill the bridge company alleges that in 1939 Phoenix caused this mortgage to be recorded, thereby wrongfully causing said

mortgage to cast a cloud upon the title to its property; and it prayed that Phoenix be required to surrender the original mortgage and any purported notes secured thereby (R. 10-11). The prayer was granted (R. 721-722).

Phoenix would relitigate the validity of this mortgage. Its position is that the $50,000 note secured by the mortgage was not introduced in evidence in the foreclosure suit nor was it in issue and, therefore, was not adjudicated. It is not claimed that there was a different consideration for the note than the consideration for the mortgage, which was held to be fraudulent and non-existent. There can be no merit in such a contention. The entire transaction was decreed to be fraudulent and without consideration. The decree is conclusive. "A successful defense on the merits in an action either on the principal debt or the collateral will bar an action on the other." 34 C. J. 853.

In this proceeding the court further found that Phoenix is threatening to prosecute further actions in the courts of Delaware against the bridge company on causes of action based upon the alleged consideration for the bonds involved in the foreclosure suit; and the decree enjoined Phoenix, its officers, agents, servants, employees and attorneys from commencing or carrying forward any suits or causes of action involved in or determined in the findings of fact and conclusions and decree dated December 1, 1936 (in the foreclosure suit), and order denying petition for rehearing and modification of decree filed March 4, 1937 (R. 722).

The decree was proper and necessary to secure to the bridge company the full benefit of the decree and orders in the foreclosure suit."

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No. 624. 19 ;

PHOENIX FINANCE CORPORATION, A CORPORATION OF THE STATE OF DELAWARE, PETITIONER,

VS.

IOWA-WISCONSIN BRIDGE COMPANY, A CORPORATION OF THE STATE OF DELAWARE, RESPONDENT.

BRIEF FOR RESPONDENT, IOWA-WISCONSIN BRIDGE COMPANY.

FRED A. ONTJES,
WM. C. GREEN,
Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No. 624.

PHOENIX FINANCE CORPORATION, A CORPORATION OF THE STATE OF DELAWARE, PETITIONER,

VS.

IOWA-WISCONSIN BRIDGE COMPANY, A CORPORATION OF THE STATE OF DELAWARE, RESPONDENT.

BRIEF OF RESPONDENT.

FOREWORD.

In answer to the page of petitioner's brief entitled "Foreword" respondent states that the opinion of the Supreme Court of New Castle County, Delaware, there referred to is a pure importation and not a part of this record, never offered in evidence, nor claimed to have come into existence until March 18, 1940, while the instant case was submitted on hearing on permanent injunction on the 11th day of March, 1940 (R. *1, 293). Hearing was

*1. Wherever in this brief reference is made to the Record on Supplemental and Ancillary proceedings, the letter "R" will be used in the brief.

had on motion for preliminary injunction and resistance thereto, in this cause, on Sept. 28, 1939, and injunction granted Oct. 7, 1939 (R. 136).

This case involves *res judicata* of decrees and orders rendered in a cause pending in the Federal Court for the Northern District of Iowa, not controlled by Delaware law, but by the laws of the State of Iowa and the decisions of the Iowa Supreme Court and of the Federal Courts.

OPINIONS BELOW.

The original decisions of the District Court (F.R. *2, 156 to 204 and 208 to 211 and 411 to 413) are reported in 19 Fed. Supp. 127, and the opinion of the Circuit Court of Appeals for the Eighth Circuit on the first appeal (F.R. Vol. VI, 1689 to 1709), is reported in 98 Fed. (2) 416. On permanent writ of injunction the District Court's findings of fact and conclusions of law appear (R. 700 to 717), opinion of the District Court (R. 717 to 719), and is reported in 32 Fed. Supp. 277, and final decree on permanent injunction appears in the record (R. 719 to 722). The opinion and decree of the Circuit Court of Appeals on permanent writ of injunction appears in the record (R. 767 to 788), and is reported in 115 Fed. (2) 1.

***2. Whenever in this brief reference is made to the Original or First Record in this cause on the former petition in this court for certiorari by Phoenix Finance Corporation (No. 438, October Term, 1938), the letters "F.R." will be used in the reference, and the letters "F.R. Supp." will be used in the reference to the supplemental volume thereof; and whenever reference is made to the Record on Supplemental and Ancillary proceedings, the letter "R" will be used in the reference.**

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on August 26, 1940 (R. 787-788). The petition for writ of certiorari was filed on the 13th day of December, 1940. The jurisdiction of this court is sought to be invoked under sub-paragraph 2 of Section 240 of the Federal Judicial Code as amended (28 U.S.C.A., Sec. 247).

QUESTIONS PRESENTED.

Whether the final decree of permanent injunction of the District Court and the affirmance thereof by the Circuit Court of Appeals is correct.

STATEMENT OF THE CASE.

Preliminary Statement.

The respondent, instead of filing a supplemental brief, files this as a complete new brief, so that everything on its part may be contained in one brief.

The petitioner in its brief refers to the summary statement of its petition for writ of certiorari and then sets forth what it calls an enlarged statement of the facts. Both of such statements are saturated with statements not supported by the record, to such an extent that the true character of the case before the trial court is not revealed. We therefore think that we can best serve this court by setting forth a concise statement of the issues and facts of the case before the trial court, to show the relationship of the parties to this cause, the identity of the subject matter of each of the Delaware cases with the matters determined in this cause and the identity of mortgage recorded with that involved in the original trial of this cause.

We are not unmindful of the doctrine of this court that the concurrent decisions of two courts upon questions of fact in a suit in equity will be followed unless clearly shown erroneous.

Brainard v. *Buck*, 184 U. S. 99.
Dunn v. *Lumbermen's Credit Assn.*, 209 U. S. 20.
Alabama Power Co. v. *Ickes*, 302 U. S. 464.

The trial court and the circuit court both found as facts that the matters involved in the Delaware actions and the $50,000 mortgage were involved in and adjudicated in this cause. However, since the petitioner is asserting that it is not bound by the adjudications, and that the matters involved in the five Delaware actions are not identical with those involved in this case, we are compelled to set forth sufficiently the issues and facts to demonstrate that the petitioner is bound, and that the identical matters were involved in and adjudicated in this case, so that they may be brought to the attention of this court if this court desires to review the facts. It makes it somewhat lengthy, but this is unavoidable on account of the petitioner's contentions, and the character of its attack on the record.

Nature of the Case.

A supplemental and ancillary bill for preliminary and permanent injunction to enforce the decrees and orders of the court and to restrain and enjoin the vexatious violation thereof and to protect the fruits of such decrees and orders.

Issues on Supplemental and Ancillary Bill.

The Iowa-Wisconsin Bridge Company, defendant in this cause, on the 18th day of September, 1939, moved

the court for leave to file a supplemental and ancillary bill, notice of which was served on Phoenix Finance Corporation, and on hearing leave was granted to file such a supplemental and ancillary bill (R. 1, 2).

The supplemental and ancillary bill as amended (R. 3-12, 98-100) alleges:

(1) That the above entitled cause was commenced by the Bechtel Trust Company (now First Trust and Savings Bank) and A. H. Schubert, as trustees on an alleged deed of trust and bonds, at the request and instigation of the complainant Phoenix Finance Corporation against the Iowa-Wisconsin Bridge Company, and that a receiver was appointed of all the property of the Iowa-Wisconsin Bridge Company and that thereafter petitions of intervention were filed by interveners with leave and by order of court to defend said action; and that Phoenix Finance Corporation was made a party complainant by order of court; and that said cause was heard and decree rendered.

(2) That on the 1st day of December, 1936, the court filed its opinion and findings of fact and the final decree, which were entered of record, copies of which are attached to the supplemental and ancillary bill as Exhibits "A," "B," and "C" (see R. 13-68). That by said final decree all matters and differences between the complainant Phoenix Finance Corporation and its predecessor, Phoenix Finance System, Inc., on the one hand and the Iowa-Wisconsin Bridge Company on the other, were fully settled, adjudicated and determined and that since the entry of said decree there had been no business transacted whatsoever between the said defendant Iowa-Wisconsin Bridge Company and the said complainant Phoenix Finance Corporation, or its predecessor.

(3) That following the entry of the decree aforesaid, the complainant, Phoenix Finance Corporation, filed a petition for re-hearing and prayed in the alternative that the decree be modified so as to withhold from adjudication the question of the validity of the $50,000 mortgage dated March 10, 1931, by permitting Phoenix Finance Corporation to institute an action at law against the bridge company if it so desired, for money had and received and to re-invest in said Phoenix Finance Corporation 517 shares of "A" stock, surrendered in exchange for bonds; that the petition for re-hearing and petition for modification of decree were denied, and that a copy of the order of the court overruling the petition for re-hearing and motion for modification of the original decree is attached to and marked Exhibit "D" and made a part of the supplemental and ancillary bill (R. 68-71).

(4) That appeal from the said decree, rulings, orders and adjudications of the trial court was taken to the Circuit Court of Appeals for the 8th Circuit by the above named complainants where the same were affirmed, a copy of the opinion of said court being attached (R. 71-93).

That petition for writ of certiorari to the Supreme Court of the United States was denied and the mandate of the Circuit Court of Appeals was issued on the 3rd day of April, 1939, and on the 6th day of April, 1939, was filed and entered in the office of the clerk of the trial court (R. 697-709).

(5) That the above entitled action was commenced about the 28th day of August, 1933. That a large number of depositions were taken which involved a great deal of time, very voluminous transcripts, hundreds of exhibits. That the trial of this cause before the Master involved a

number of weeks and at the said trial a large amount of additional oral testimony was taken; that the hearing before the court on exceptions involved months of work, and that the hearing before the trial court to settle the record of this cause before the Circuit Court of Appeals involved many weeks of additional work. That this cause was defended against the unjust claims of Phoenix Finance Corporation at great expense to the bridge company, and in said actions the various claims of Phoenix Finance Corporation were fully heard and adjudicated. That to re-litigate the matters determined, piecemeal or otherwise, would subject the bridge company to great expense and impair its credit and business to its irreparable injury.

(6) That notwithstanding the final adjudications and orders of the District Court of the United States for the Northern District of Iowa, the complainant, Phoenix Finance Corporation, is disregarding said adjudications and orders, and for the purposes of attempting to invalidate and nullify the decree and order of said court, and for the purpose of depriving the defendant, Iowa-Wisconsin Bridge Company, of the fruits of said adjudications, and for the purpose of harassing, vexing, annoying and destroying the business of said defendant, has commenced and is prosecuting and is about to prosecute in the State of Delaware numerous and divers suits and actions involving the same matters fully and finally determined by the United States District Court for the Northern District of Iowa, and has further and in contempt of said court filed for record and recorded the $50,000 mortgage hereinbefore and hereinafter referred to, held by said court to be fraudulent and invalid.

(7) That, in particular, said Phoenix Finance Corporation has commenced and is prosecuting the following suits against the defendant:

a. On or about September 29, 1938, an action in the Superior Court of the State of Delaware, in and for New Castle County, the alleged cause of action being based on two alleged promissory notes, one of $2,000 dated December 15, 1932, and one of $3,125 dated January 20, 1933, which were involved in the above entitled cause and the adjudication thereof; that in this cause it was claimed that said notes and the alleged consideration thereof formed part of the consideration for the issuance of $20,100 of the bonds involved in this action. That the trial court had found that said bonds were fraudulently issued and wholly without consideration, and were more than offset by indebtedness of Phoenix Finance Corporation and its predecessor, Phoenix Finance System, Inc., to the bridge company. That in the cause in Delaware, the defendant bridge company had interposed the defense of *res judicata* and other defenses, such as want of consideration. That the cause was tried on the issues raised by the plea of *res judicata*, but had not yet been determined by the Delaware court (R. 5-6).

(b) On or about the 20th day of February, 1939, an action in the Court of Chancery in the State of Delaware in and for New Castle County, bill of complaint asking to recover 517 shares of Class "A" stock of the bridge company, which were surrendered and cancelled at the time Phoenix Finance Corporation fraudulently procured the issuance of $60,500 of bonds involved in and found in this action, which stock the trial court and the Circuit Court of Appeals ordered adjudged, and found Phoenix was not entitled to have re-issued to it. That the bridge

company had answered in that cause, but the cause had not been tried (R. 5-6).

(c) On or about the 22nd day of June, 1939, an action in the Superior Court of Delaware in and for New Castle County, declaration and affidavit of demand in which was filed on September 18, 1939 (R. 104), based upon an alleged promissory note of $500, dated December 31, 1932, an alleged promissory note of $12,110.19, dated July 7, 1933, an alleged claim for $15,000 for money claimed to have been lent and advanced by defendant to plaintiff in that case, and upon an alleged claim for $7,000 claimed to have been for money due and payable from the defendant to the plaintiff in that case, Phoenix Finance Corporation, for interest and forbearance. That the said alleged promissory notes of $500 and $12,110.19 were involved in the above entitled cause, and the adjudication thereof; that in this cause it was claimed that said notes and the alleged considerations therefor formed part of the consideration for the issuance of $20,100 of bonds involved in this action. That the trial court found that the said bonds were fraudulently issued and wholly without consideration, and were more than offset by an indebtedness of Phoenix Finance Corporation and its predecessor to the defendant bridge company. That as to the alleged claim for $15,000 this is a mere restatement of the alleged cause of action on the notes aforesaid, stated in different form, and in the alternative, and the alleged claim for $7,000 is merely a claim for interest on the notes aforesaid stated in different form and in the alternative. That all of the alleged claims were involved in and adjudicated in the above entitled cause in the trial court (R. 7, 98).

(d) On or about June 22, 1939, an action in the Superior Court of Delaware in and for New Castle County, declaration and affidavit of demand in which was filed on September 18, 1939 (R. 104), based on an alleged agreement claimed to have been entered into between Phoenix Finance System, Inc., John W. Shaffer & Company and Iowa-Wisconsin Bridge Company, dated November 10, 1930, under and by virtue of which said Phoenix Finance Corporation claims defendant became indebted to Phoenix Finance System, Inc., in the sum of $21,262.71, claims to be the assignee of said Phoenix Finance System, Inc., and claims the total amount of $50,000 for principal and interest (R. 99); that attached to the declaration in said case is a copy of said purported agreement (see R. 321-338, particularly 336-338). The said agreement so referred to in said declaration, and sued upon, is the same agreement described and referred to by the court in its findings of fact No. 24, appearing at pages 13, 14 and 15 of Exhibit "B" attached to the supplemental and ancillary bill of complaint (see R. 51, 52), which the trial court found to be without consideration, a fraud upon the bridge company, void and *ultra vires* (R. 7, 98-99).

(e) On the 11th day of July, 1939, an action in the Superior Court of Delaware in and for New Castle County, declaration and affidavit of demand in which was filed September 18, 1939 (R. 104), based on certain of the bonds which were involved in the above entitled action, to-wit: One Series "B" bond No. 93, in the face amount of $500; one Series "B" bond No. 97, in the face amount of $500. That the trial court in its final decree adjudged and held that all bonds held by Phoenix Finance Corporation were invalid, fraudulent and issued

without consideration, and that it found certain bonds which had been issued to Helmer Anderson in the total amount of $7,400 to be valid to the extent of $6,000 only, and directed that the said sum of $6,000 be paid from income of the bridge company; that said Series "B" bonds, Nos. 93 and 97, upon which suit has been commenced in the State of Delaware, as hereinbefore set forth, are portions of the $7,400 of the bonds issued to Helmer Anderson and allowed in part by the trial court as aforesaid (R. 7, 99).

(f) This paragraph alleged a Delaware action to recover on $5000 of toll tickets claimed to have been adjudicated, but the court did not grant injunction with respect to that action (R. 7-8, 136).

(8) That defendant had had no business with Phoenix Finance Corporation since the commencement of this action (R. 100).

(9) That John A. Thompson, who had been found by the trial court to control Phoenix Finance Corporation, while dominating and controlling the bridge company in a fraudulent scheme, plan and conspiracy to cheat and defraud the bridge company and its stockholders, as president of Phoenix Finance Corporation, asserted on the 6th day of December, 1939, after the decision of the United States Supreme Court, in substance, that the litigation involved in this action was not ended and would not be ended for a good many years; and on July 8, 1939, further asserted that one case had been tried in the courts of Delaware; that the matters involved in this case were not over, and that there were six cases in the State of Delaware that would be carried on in the course of the next few months (R. 8-10).

(10) This paragraph alleges in substance that John A. Thompson on the 23rd day of November, 1938, wrote to the stockholders of the bridge company:

> "In the end the facts will all be proved in competent courts. I am not a bit disturbed about the outcome."

That on the 12th day of June, 1939, John A. Thompson, president of the Phoenix Finance Corporation, wrote to a stockholder and director of the bridge company:

> "As to the $97,000 of bonds, even if the mortgage deed of trust has been adjudicated and eliminated and it is still shown that the bridge company owes the $97,000 for legitimate borrowings, it makes little difference whether the bridge company pays the debt by reason of a mortgage foreclosure or by way of judgment and execution against the bridge. * * * These $20,100 of bonds were pledged as collateral against the bridge company notes for borrowed money, totaling $17,735.19."

That there were suits pending in Delaware and that there was not the slightest chance that the items involved in this cause would not be collected because the Phoenix in Delaware would have an opportunity to present its evidence, which was never done in any of the proceedings in the Federal Court (R. 9-10).

(11) That on June 2, 1939, the said John A. Thompson and Phoenix Finance Corporation caused to be recorded in Allamakee County, Iowa, the alleged mortgage of the bridge company to Phoenix Finance System, Inc., for $50,000.00, dated March 10, 1931, which the trial court had found to be without consideration, fraudulent and void, issued as part of a scheme, plan and conspiracy to cheat and defraud the bridge company and its stock-

holders, and by the recording of the said alleged mortgage Phoenix has wrongfully cast a cloud upon the title of the bridge company to its property, and has attempted to render null and void that portion of the decree and order of the trial court finally determining the invalidity of said mortgage (R. 10).

(12) That the complainant, Phoenix Finance Company, is threatening to and unless restrained by the court will proceed to institute and prosecute the actions hereinbefore referred to and will permit to remain on record the invalid $50,000 mortgage aforesaid; that unless said complainant, Phoenix Finance Corporation, is restrained as prayed, the defendant bridge company will be deprived of the fruits and advantages of the judgment, decrees and orders of the court in this cause, and Phoenix will continue with vexatious suits in utter disregard thereof. That the acts of Phoenix will cast a cloud over defendant bridge company's franchise because of a multiplicity of vexatious suits brought and to be brought against the defendant bridge company, and said bridge company will be damaged in a way that cannot be repaired or estimated at common law, and that from these threatened wrongs the defendant has no remedy at common law, but the only remedy is in equity (R. 10, 11).

The bill then prayed for a preliminary and permanent, prohibitive and mandatory injunction, restraining and enjoining Phoenix Finance Corporation, its officers, agents, servants, employees and attorneys, etc., from proceeding with the suits in Delaware referred to in the bill and to forthwith dismiss them, etc., to satisfy and remove from the records the $50,000 mortgage hereinbefore referred to, and to surrender the original of said mortgage and purported notes secured thereby to the court for cancellation, and for general equitable relief (R. 11, 12).

Preliminary Injunction.

On the 18th day of September, 1939, the bridge company filed motion for preliminary injunction against the Phoenix Finance Corporation as prayed in the supplemental and ancillary bill (R. 101 to 103), and on September 28th, 1939, Phoenix filed resistance thereto (R. 112-118), and on that day hearing was had on the motion and resistance thereto, and the matter submitted subject to filing of briefs by both sides within five days (R. 119). And Phoenix was directed to file its answer to the supplemental and ancillary bill as amended within ten days (R. 119). On October 7, 1939, the court filed its findings of fact and conclusions of law (R. 120 to 131), and on that day entered an order granting preliminary injunction (R. 132-140), as prayed, except as to the "ticket case," referred to in paragraph 7-f of the bill as amended (R. 7-8, 99-100, 136). On November 6, 1939, the court made a modification of the preliminary injunction as to release of mortgage and maintenance of the status quo (R. 145-146).

Answer and Proceedings Thereon.

On October 9, 1939, Phoenix filed answer to supplemental and ancillary bill as amended and cross bill (R. 747), to which the bridge company filed a motion to strike and supplement and second supplement to said motion (R. 747-748). On November 11, 1939, the court entered an order sustaining the bridge company's supplement and second supplement to motion to strike, striking the Phoenix answer and counterclaim as amended in its entirety and ordering the Phoenix to answer the bridge company's complaint as amended within twenty days, the answer to conform to rule 8 of the Rules of Civil Procedure (R. 749).

On November 27, 1939, Phoenix filed a voluminous answer and counterclaim (R. 146-167).

On the 28th day of November, 1939, defendant bridge company filed a motion (R. 167-169) (1) to strike answer and counterclaims of Phoenix Finance Corporation in its entirety for the reasons: that it is saturated with alleged evidence, argument, foreign matter and conclusions and in violation of rule 8 of the Rules of Civil Procedure, particularly subdivision (b), and is prolix.

(2) Subject to the court's ruling on division (1) thereof, to strike from paragraph 1 of said answer and counterclaim, the last three lines commencing with the words "but alleges" on page 1 and the remainder of said paragraph on page 2 on the ground that same is argument and conclusions.

(3) Subject to the court's ruling on division (1) thereof, to strike from said answer and counter-claim alleged defenses and counter-claims 2 to 7 inclusive, consisting of paragraphs 13 to 45, both inclusive, and to strike each of said defenses and counter-claims and each of said paragraphs separtately, for the following reasons, to-wit:

(a) That the same are saturated with alleged evidence, argument, foreign matter and conclusions in violation of rule 8 of the Rules of Civil Procedure and particularly subdivision (b) and are prolix.

(b) That the matters pleaded in said alleged defenses and paragraphs are insufficient in law to constitute a defense to the supplemental and ancillary bill of complaint, and are not responsive to the issue tendered by the supplemental and ancillary bill, and are repetitious, incompetent, irrelevant and redundant matter.

(c) That the matters involved in this cause and presented by the supplemental and ancillary bill as amended have been adjudicated and that a counter-claim cannot be filed subsequent to such adjudication; that the matters alleged do not constitute any basis for counter-claim and that the alleged counter-claim is included in the answer without leave or permission of the court, and that the matters alleged in said paragraphs are sham, impertinent and contemptuous matter. *3.

On the 18th day of December, 1939, the court entered an order (R. 171-172) which provided:

"First, that there be stricken from said answer paragraph 1, 'first defense,' all that part on page 1, following the word 'only' on the next to the last line of said paragraph, and the quoted paragraph at the top of page 2 of said answer (see R. 147, lines 15 to 21).

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*3. "SECOND DEFENSE." (R. 151.) The allegations under this heading of the answer do not constitute a defense. The trustees represented all the bondholders, and Phoenix Finance Corporation itself was made a party under proper order of court, and on it and the trustees rested the burden of coming forward with any claim of innocent holders. No such proof was presented. The question of consideration of the Helmer N. Anderson bonds was fully litigated and determined, and Phoenix, a party to the action, cannot now assert that after the commencement of the action, and just prior to the rendition of the decree, it acquired part of such bonds, and that it is therefore entitled to any other or different rights than as provided in the decree. (F.R. 695; 37-38; 43-44; 1478-1482; 790-794; 11; 160-162-166; 68-72; 86; 11-92; 102-103; 92-97; 17-98; 614-616; 538-637.)

"THIRD DEFENSE." (R. 152.) The allegations under this heading are not responsive to the allegations of the ancillary bill and do not constitute a defense and are immaterial and statements of legal opinions and conclusions. It is a mere suggestion that the decrees and orders of the court be disregarded and that a plea of res judicata be raised and tried in some other jurisdiction at great expense. The trial court had power to enforce obedience to its orders and decrees and to protect the fruits of victory granted thereby.

"Second, that there be stricken from said answers numerical paragraphs 13 to 45, inclusive, being designated defenses 2nd to 7th, inclusive (R. 151-157), for the reason that in such paragraphs and defenses the respondent, Phoenix Finance Corporation, is clearly endeavoring to relitigate questions of fact and law which were litigated and opportunity given to litigate on the trial of the principal case, in which trial and decision all accounts, indebtedness and matters entered into, the consideration of the issue of each and all of the bonds secured by the mortgage sought to be foreclosed were in question and were considered and determined.

"The court being of the opinion that the remaining matters, including admissions and denials set forth in the first division of said answer, designated as 'first defense' are sufficient for the proper consideration and

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"FOURTH DEFENSE AND FIFTH DEFENSE." (R. 152-153.) The original pleadings were part of the record and it was not necessary nor proper to make them part of the answer to ancillary bill by reference. The allegations under these headings are a mere rehash of what had been previously determined by the trial court and the Circuit Court of Appeals (opinion of trial court, 19 Fed. Supp. 128, 8 C.C.A., 98 Fed. (2) 460), and constitute no defense whatever to the ancillary bill as amended, are a repetition of denials of alleged first defense and statements of conclusions.

"SIXTH DEFENSE AND SEVENTH DEFENSE." The allegations of the answer under these headings are not responsive nor germane to the issues tendered by the supplemental and ancillary bill. They are a mere repetition of Phoenix' contentions on the original trial which the trial court and the Circuit Court of Appeals found were not well founded and so adjudicated and are in contravention of the record. (See opinion and findings of fact of the trial court, original hearing, F.R. opinion 156-179; findings 179-202; decree 202-204; 19 Fed. Supp. 127; opinion, Circuit Court Appeals, F.R. 1689-1709; decree, F.R. 1709; Phoenix' petition for rehearing, F.R. 1710 to 1716, order overruling petition and mandate, F.R. 1716.) Counter-claim based on matters adjudicated by original findings and decree cannot be pleaded in defense to the enforcement of such decree. Ashby v. Manley, 191 Iowa 113, 116, 181 N. W. 869. The allegations are incompetent, irrelevant and immaterial, and conclusions and argumentative, foreign matter. Rules Civil Procedure, Rule 12-F.

determination of all issues presented by said supplemental and ancillary complaint, no further time is granted or permission granted to further amend said answers."

That part of the answer of Phoenix not stricken by the court, designated as "first defense" is as follows:

1. Denies each and every allegation of paragraph 1, except that it admits the above entitled cause was commenced by said trustees on a certain deed of trust and bonds at the formal request of Phoenix; that a receiver was appointed of all the property of the bridge company, and that thereafter petitions of intervention were filed by the above named intervenors with leave of court, and that Phoenix was by order of court made a party complainant, but alleges that by said order it was made a nominal complainant only, and alleges that the said receivership was solely that incident to the foreclosure and not a general receivership (R. 147).

"PARAGRAPHS 40, 41 and 42." (R. 164-166.) The assertion in these paragraphs of the answer that when this cause was submitted to the Master it was supposed that only the question of foreclosure of the mortgage was involved and that the matter of the validity of the bonds was postponed for later hearing is directly contrary to and in contravention of the record. No such question existed before the Master. The validity and consideration of both the mortgage deed of trust and bonds were directly submitted to him. (F.R. 107-108.)) On oral argument before the Master on the 25th day of October, 1935, it was stated by counsel for the parties that the entire case was submitted. (F.R. 694-695.) The Master made his report. Exceptions of trustees and of Phoenix were filed to such report. (F.R. Supp. 3-61.) And the trial court spent months of time going over the entire record as to the foundation of each and every bond and made its decision. Phoenix then filed a petition for rehearing, making like allegations as now alleged. (F.R. 207-218.) And said petition for re-hearing was adopted by the trustees in their motion for dismissal and in the alternative for rehearing. (F.R. 214; also see answer to petition for rehearing supported by affidavits, F.R. 394-410.) The petitions for rehearing were overruled. (Court's order and opinion, F.R. 411-413; 19 Fed. Supp. 127 at 142.) On first appeal to the Circuit Court of Appeals Phoenix, by its assignments of error 60 and 64, presented the question of alleged abuse of discretion in the denial of its petition for rehearing, (a) because

2. Admits the first sentence of paragraph 2 and denies each and every allegation of the second sentence of paragraph 2 (R. 147).

3. Denies each and every allegation of paragraph 3, except that it admits that after the entry of the decree aforesaid it filed a petition for rehearing, with an alternative prayer, but alleges that said alternative prayer was in words and figures as follows:

Second. In case rehearing is denied, then as alternative relief that the decree be modified so as to withhold from adjudication the question of the validity of the $50,000 mortgage, given by the bridge company to petitioner, reserving the right to petitioner to litigate said mortgage in another action, if it so desires.

Third. In case rehearing is denied, the decree be so modified as to reinvest in petitioner 517 shares of "A" stock surrendered in exchange for bonds.

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of alleged misunderstanding of complainant's counsel as to the issues in the case that were being tried (assignment 60, F.R. 527), and (b) overruling petition for rehearing. (Assignment 64, F.R. 528.) There was no misunderstanding as to the issues being tried before the Master. The Circuit Court of Appeals went over the entire record and affirmed the trial court's decision. (F.R. 1689 at 1694, 98 Fed. (2) 416 at 421.) Now we are met with the effrontery of Phoenix saying that all this ought to be disregarded as though Phoenix had not had a day in court, although it conducted the entire proceedings. Phoenix in these alleged and pretended defenses six and seven, is seeking to disregard the orders and decrees of the court previously made and to re-litigate what has been decided, by merely re-pleading in its answer to the ancillary bill the matters contained in its former petition for re-hearing.

Pittsburgh Reduction Co. v. Cowles Elec. S. & A. Co. (C.C.N.D. Ohio), 64 Fed. 125.

Central Trust Co. of N. Y. v. Worcester Cycle Co. (C.C. Conn.), 91 Fed. 212.

Hicks v. Otto (C.C.S.D.N.Y.), 85 Fed. 728.

Acme Flexible Clasp Co. v. Cary Mfg. Co. (C.C.S.D. N.Y.), 99 Fed. 500.

Fourth. In case rehearing is denied, that the decree be modified so as to withhold from adjudication the right of petitioner to institute an action at law against the bridge company if it so desires, for money had and received; and that it admits that the petition for rehearing and the alternative prayers were all denied by the order set forth in Exhibit D, and alleges that neither the decree nor the said order was any adjudication against Phoenix of the matters set forth in the alternative prayer (R. 147-148).

4. Admits the allegations contained in paragraph 4 (R. 148).

5. Answering paragraph 5, admits all allegations concerning date of commencement, depositions, transcripts, exhibits, and trial before Master, except the

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"PARAGRAPH 33." (R. 166.) This paragraph of the answer is in direct conflict with and in contravention of the record. The record supports the court's finding and adjudication. (See F.R. 613-616; F.R. 552; F.R. 667, folio 977; F.R. bottom 635, top 636; John A. Thompson deposition, F.R. 414-500; and particularly F.R. 425-427, 434, 435, interrogatories 200-202, and see answer to petition for rehearing and affidavits thereto attached, F.R. 396-399), and the adjudication was not reversed, but affirmed, on the first appeal.

"PARAGRAPH 44." (R. 166-167.) In this paragraph of the answer it is alleged that in support of the petition for re-hearing, counsel for Phoenix submitted affidavits of witnesses and that it endeavored to procure affidavits from other witnesses to substantiate the allegations of the petition for re-hearing, and that on account of alleged representations of counsel for interveners and an intervener, it was unable to obtain them. (R. 166-167.) The allegations in said paragraph 44 of the answer show on their face that the pretended affidavits or evidence could have been only cumulative in any event. That such a course of procedure is wholly inadmissible under the settled rule of res judicata is held in So. Pac. R. Co. v. U. S. (168 U. S. 1, 18 Sup. Ct. 18, at p. 33). The allegations are mere opinions and conclusion, incompetent, irrelevant and immaterial. There is no allegation as to what it is claimed the so-called "other witnesses" (not named) know or claimed to know with respect to the facts in this case, nor what it is claimed they would have asserted in such affidavits, or what they would testify to, nor that any of them had any connection with or to do with any of the matters involved in this

length thereof which appear in paragraph 5 prior to the allegation concerning work on exceptions, settling record, and appeal, and as to this allegation Phoenix states it is without knowledge or information sufficient to form a belief as to the truth thereof. Further answering, denies each and every allegation of paragraph 5, not herein expressly admitted (R. 148).

6. Denies each and every allegation of paragraph 6, except that it admits that it has commenced and is prosecuting, and is about to prosecute, in the State of Delaware, the suit and actions hereinafter specifically described, save as restrained by the preliminary injunction issued by the court, and admits that it has filed for record and recorded a $50,000 mortgage from the bridge company to Phoenix Finance System, Inc. (R. 148).

7. Answering paragraph 7, admits that it has commenced and it was prosecuting the following suits against

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case, or knowledge thereof. The record shows that the persons who had to do with the various transactions involved in this case were called as witnesses on depositions, or as witnesses at the trial, and nothing is alleged as to what it is claimed any of the so-called "other witnesses" would have made affidavit to not contained in evidence on the trial or in Phoenix' petition for rehearing and affidavits attached thereto. Phoenix attached to its petition for rehearing of January, 1937, the affidavits of its then counsel and thirty-six purported affidavits of stockholders, former directors and others (F.R. 216-391), and if there had been any interference with its procurement of affidavits there is no question but that the then counsel for Phoenix would have learned of that while they were gathering the numerous alleged affidavits presented, and would have asserted it in its petition for rehearing and affidavits in support thereof. The assertion [illegible]id paragraph 44 is made for the first time in 1939 when Phoenix was called upon to obey the decrees and orders of the trial court and of the Circuit Court of Appeals, and appearing by counsel from Delaware. Furthermore, if the alleged representations had been made, this record is replete with evidence that they would have been true. The trial court and the Circuit Court of Appeals found John A. Thompson to be guilty of fraudulent conspiracy and it would have been perfectly proper for interveners' counsel, if consulted, to have advised persons to be careful not to make false affidavits.

the bridge company until the entry of the preliminary injunction herein by this court:

(a) Admits that it filed the action described in paragraph 7(a), based on two promissory notes, one of $2,000 and one of $3,125; admits that this court set forth in its decree that the mortgage and bonds sought to be foreclosed were fraudulent issues and that the bonds were without valid consideration, with the exception of certain bonds aggregating $15,000; admits that in the said Delaware action the bridge company pleaded *res judicata* and other defenses, such as want of consideration, and that the said cause was tried on the issue of *res judicata* but has not yet been determined by the Delaware court, and alleges that all other defenses except *res judicata* were withdrawn by the bridge company prior to the submission of said cause. Further answering paragraph 7(a), Phoenix denies each and every allegation thereof not herein expressly admitted.

(b) Admits that it commenced the action described in paragraph 7(b), seeking the delivery to Phoenix of a new certificate for 517 shares of Class "A" stock; admits that the certificate for these shares was delivered by Phoenix to the bridge company in connection with the issue of $60,500 of bonds to the bridge company; admits that the bridge company answered in said cause in Delaware, and alleges that the bridge company has pleaded the defense of *res judicata* therein, and admits that the said cause has not been tried. Further answering, Phoenix denies each and every allegation of paragraph 7(b) not herein expressly admitted.

(c) Answering paragraph 7(c), admits the allegations thereof as contained in the original supplemental and ancillary bill before amendment. As to the matters

added by said amendment, Phoenix admits that said cause of action in Delaware is based upon promissory notes of $500 and of $12,110.19, dated as set forth in the amendment, and that said Delaware cause claimed $7,000, as interest to July 1, 1939, and admits that the common counts in the sum of $15,000 were also pleaded in said action. Admits that this court in its decree set forth that the mortgage and bonds sought to be foreclosed were fraudulently issued and that all bonds, with the exception of certain bonds aggregating $15,000, were without valid consideration. Further answering paragraph 7(c), Phoenix denies each and every allegation thereof not expressly herein admitted.

(d) Answering paragraph 7(d), Phoenix admits the allegations thereof contained in the supplemental and ancillary bill before amendment, and admits the allegations contained in the first sentence of the paragraph added to paragraph 7(d), by amendment; admits that the agreement sued upon in said Delaware action is referred to in finding No. 24 of this court. Further answering, Phoenix denies each and every allegation of paragraph 7(d) not herein expressly admitted.

(e) Answering paragraph 7(e), Phoenix admits the allegations thereof contained in the original supplemental and ancillary bill before amendment; further answering Phoenix admits that its cause of action in Delaware was based upon two Series "B" bonds of the bridge company, numbered 93 and 97, in the face amount of $500 each; admits that bonds in the total amount of $7,400 originally issued to Helmer Anderson were allowed by this court to the extent of $6,000, and were directed to be paid from the income of the bridge company, and admits that said bonds numbered 93 and 97 constitute part of the

bonds originally issued to Helmer Anderson by the bridge company. Further answering, Phoenix denies each and every allegation of paragraph 7(e) not herein expressly admitted (R. 148-150).

(f) This paragraph of the answer relates to the "toll ticket case" which was not enjoined (R. 150).

8. Denies each and every allegation of paragraph 8.

9. Denies each and every allegation of paragraph 9, except that it admits that on July 8, 1939, John A. Thompson did say that there were six cases pending in the State of Delaware that would be carried on in the course of the next few months (R. 150).

10. Denies each and every allegation of paragraph 10, except that it admits that John A. Thompson on November 23, 1938, wrote a letter to the stockholders of the bridge company, containing the substance of but not precisely, the matter as it is purported to be quoted in the supplemental and ancillary bill herein, and admits that on June 12, 1939, John A. Thompson wrote to a stockholder and director of the bridge company substantially, but not precisely, as quoted in paragraph 10 of the supplemental and ancillary bill herein, and Phoenix offers to present true and correct copies of said letters at the trial hereof (R. 150-151).

11. Denies each and every allegation of paragraph 11, except that it admits that on June 2, 1939, it caused to be recorded in the office of the county recorder, in Book L, pages 625-626 of the records of Allamakee County, Iowa, a certain mortgage executed by the bridge company to Phoenix Finance System, Inc., in the sum of $50,000, dated March 10, 1931, and admits that this court in its findings made reference to this mortgage substantially as

set forth in paragraph 11 of the supplemental and ancillary bill herein (R. 151).

12. Denies each and every allegation of paragraph 12, except that it admits that it intends to prosecute the actions hereinbefore described in paragraph 7 and proposes to permit to remain on record the $50,000 mortgage above described, to the extent that it is not restrained by the preliminary injunction of this court (R. 151).

RECORD SHOWING PROCEEDINGS HAD PRIOR TO SUPPLEMENTAL BILL.

The Original Bill.

The original bill in this case was filed by the First Trust and Savings Bank (formerly Bechtel Trust Company), resident of Iowa, and A. H. Schubert, a resident of Wisconsin, as trustees, versus Iowa-Wisconsin Bridge Company, a Delaware corporation, on August 28, 1933, for the foreclosure of a deed of trust securing an alleged $200,000 bond issue. The action was instituted at the request and instigation of appellant, Phoenix Finance Corporation, and carried on at the expense of and under the direction of said Phoenix Finance Corporation by attorneys of its selection (F.R. 537; Exhibit 28, H.E.B., F.R. 789-791, especially top 790, offered F.R. 535; Exhibit B, H.E.B., F.R. bottom 794, and top 795, offered F.R. 537; Exhibits B-1, H.E.B. (403 H.L.B.), B-2, H.E.B. (404 H.L.B.), F.R. 617; 1478-1479, B-3, B-4, B-5, B-6 and B-7, H.E.B., F.R. 1480-1482, approved as part of narrative statement, F. R. 709, 720-21, 723; Exhibit B-6, on stationery Phoenix Finance System, predecessor Phoenix Finance Corporation, signed John A. Thompson, who was president of Phoenix Finance Corporation and of its

predecessor, F.R. 1481; approved as part of narrative statement, F.R. 709, 723.)

The bill alleged jurisdiction based on diversity of citizenship, and alleged a mortgage deed of trust securing a bond issue of $200,000.00 and containing provision making it the duty of the bridge company to pay taxes on the mortgaged property (F.R. 31), to pay interest on the bonds and to pay the bonds as they matured (F.R. 29). In case of default for a period of sixty (60) days, it was provided that the trustees "may," and upon the written request of the holders of twenty-five per cent of the bonds then in default "shall" declare the principal of all the bonds due (F.R. 35), and "shall proceed to protect and enforce their rights and the rights of the bondholders, under this indenture by a suit or suits in equity or at law * * * by * * * foreclosure hereunder, or for the enforcement of any other appropriate legal or equitable remedy, as the trustees * * * shall deem most effectual" (F.R. 37-38) and in addition to Section 13 (F.R. 43-44) of the mortgage or trust deed, quoted from in the first opinion of the Circuit Court of Appeals (98 Fed. (2) 416, at 420), it also provided: "Section 10. The company covenants that (1) in case default shall be made in the payment of any interest on any bond or bonds at any time outstanding and secured by this indenture, and any such default shall continue for a period of sixty days, or (2) in case default shall be made in the payment of the principal of any such bond when the same shall become payable, whether by the regular maturity of said bond, or by declaration as authorized by this indenture, or by sale as provided in Section 6 of this article, or otherwise, then upon demand of the trustees the company will pay to the

trustees, for the benefit of the holders of the bonds and coupons hereby secured then outstanding, the whole amount due and payable on all such bonds and coupons then outstanding, for interest or principal or both, as the case may be, with interest upon the over due principal and/or installments of interest of each such bond at the coupon rate, *and in case the company shall fail to pay the same forthwith upon such demand, the trustees in their own names, and as trustees of an express trust, shall be entitled to recover judgment for the whole amount so due and unpaid.*

"*The trustees shall be entitled to recover judgment as aforesaid, either before or after or during the pendency, of any proceeding for the enforcement of the lien of this indenture upon the trust property, and the right of the trustees to recover such judgment shall not be affected by any sale hereunder, or by the exercise of any other right, power or remedy for the enforcement of the provisions of this indenture, or for the foreclosure of the lien hereof*; and in case of a sale of the mortgaged property, and of the application of the proceeds of such sale to the payment of the debt, the trustees in their own names and as trustees of an express trust, shall be entitled to enforce payment of and to receive the amount then remaining due and unpaid upon any and all bonds issued hereunder and then outstanding for the benefit of the holders thereof, and shall be entitled to recover judgment for any portion of the debt remaining unpaid, with interest * * *" (F.R. 41-42). (Emphasis supplied.)

The bill alleged that all of said bonds were duly made and executed on behalf of the bridge company, duly presented to and authenticated by Bechtel Trust Company (trust company) as in said mortgage deed of trust pro-

vided, and that all of said bonds, together with interest coupons attached thereto evidencing interest thereon as aforesaid, have now been issued for a *good and valuable consideration and are now outstanding in the hands of divers persons and corporations who are now the owners and holders thereof for value.* Said bonds and interest coupons are valid obligations of said Iowa-Wisconsin Bridge Company, and are entitled to the benefit and security of said mortgage deed of trust. The bill further alleged authority of the trustees to sue under the terms of the deed of trust, default and acceleration of due date, and prayed:

"1. That an account be taken of all property in the Northern District of Iowa subject to the lien of said mortgage deed of trust, and that said deed of trust may be decreed to be a valid first lien upon all and singular thereof.

"2. That an account may be taken of the bonds and interest coupons secured by said mortgage deed of trust and the amount *due on the bonds* for principal and interest or otherwise, and the amounts expended or to be expended by your complainants, and that said Iowa-Wisconsin Bridge Company be decreed to pay to your complainants *the amount found to be due on such accounting,* together with costs and expenditures in this proceeding and attorneys' fees by the court assessed, within a short day to be fixed by the court; and that in default of said payment the mortgaged property be sold • • • to satisfy the amount so found due and costs, and in case

of such sale the defendant * * * be barred and foreclosed of all equity of redemption. * * *. *4.

"3. * * *

"4. That in the event the proceeds of such sale shall not be sufficient to satisfy in full the decree to be rendered in this suit that these complainants *have a decree* against said Iowa-Wisconsin Bridge Company *for the deficiency.*

"5. For a receiver of all the property of the defendant.

"6. For general equitable relief (F.R. 11). (Emphasis supplied.)

An answer was filed on the part of the bridge company, which admitted diverse citizenship of the parties and admitted the issuance of certain bonds, but denied that said bonds were a valid and binding lien against the real estate of the property of the defendant; denied that the complainant was entitled to the relief prayed for and denied every matter set out in the complaint not otherwise disposed of; admitted the execution of purported mortgage deed of trust but denied the validity thereof, and denied that the amount claimed on said bonds was actually due; alleged that a large part of the bonds were improperly executed and delivered; that the defendant did not have full and complete record of the issuance or transfer of said bonds nor the consideration received

*4. This necessitated first the determination of the amount due, if any, before a short day for defendant to pay could be fixed, because otherwise it would not be known what the defendant was required to pay to avoid foreclosure.

therefor; alleged the belief that there was a good defense to all or part of complainant's claim; alleged conflicting interests of common directors of the bridge company and Phoenix Finance System, Inc.; denied complainant's right to the appointment of a receiver, and prayed the court:

"To deny complainants the appointment of a receiver and to compel complainants to make a complete showing and accounting to this court of the method and manner in which bonds were sold and delivered, the consideration paid and received therefor; and to compel complainants to show in what manner the bonds authenticated by the trustees were disposed of * * * and to compel the complainants to make a complete showing as to the consideration received in each and every instance for the delivery of authenticated bonds; and prayed the protection of the court (F.R. 62 to 66).

Appointment of Receiver.

On September 28, 1933, the court appointed a receiver of all of the property of the bridge company of every kind and took the same into legal custody (F.R. 68-72). The court then had full, complete and exclusive jurisdiction of the parties and the subject matter of the action.

Intervention.

On December 5, 1933, by leave of court, Fayette D. Kendrick, a stockholder of the bridge company, and citizen of Minnesota, intervened on behalf of defendant, himself and all other stockholders similarly situated (F.R. 73-83) praying that the complainant's bill be dismissed, the bonds cancelled and the deed of trust set aside and for general equitable relief. He alleged that John A. Thompson and his associates, officers and directors of

Phoenix Finance System, Inc., dominated the bridge company, and by the exercise of such domination, fraudulently procured the execution and delivery of the deed of trust and the issuance of the bonds to corporations controlled by them; that all of the bonds and mortgage deed of trust were issued as a part of the fraudulent scheme, plan and conspiracy with intent to cheat and defraud the bridge company and its stockholders out of their property; that in pursuance thereof part of the bonds issued were fraudulently obtained by cancelling stock and that the bonds and mortgage were fraudulent, without consideration, invalid and void; that none of the bonds had passed to innocent purchasers for value without notice; *that said John A. Thompson and his associates in conspiracy still were in control of the defendant bridge company and that demand by interveners to obtain relief from or through said defendant bridge company would be unavailing* (F.R. 73-83; Amendment to Petition of Intervention, F.R. 100 to 102). On December 5, 1933, the court granted the intervention (F.R. 85 to 86). The Master and the court found that the bridge company was not making and would not have made a good faith defense to complainant's action had not the interveners intervened (F.R. 134, par. 13; 160, par. 13, and 183).

Phoenix Finance Corporation Made an Ancillary Party—Subsequent Pleadings.

On December 5, 1933, intervener made a motion that Phoenix Finance System, Inc., and certain other corporations be made parties (F.R. 83-84). The motion was granted. The court's order provided:

> "The motion of Fayette D. Kendrick, intervener, to make additional parties plaintiff and defendant to the petition of intervention then came on for hearing

and complainant's counsel having stated in open court *that the Phoenix Finance Corporation has succeeded the Phoenix Finance System, Inc., and is the holder of the bonds* involved in this action with the exception of about $10,000 worth of said bonds. It is hereby ordered and directed that the Phoenix Finance System, Inc., and the Phoenix Finance Corporation be made parties plaintiff in this cause, and defendants to the petition of intervention and the clerk of this court is hereby directed to issue the necessary processes and summons for said purpose." (Emphasis supplied.) (F.R. 86.)

Petition of intervention was ordered to stand as an answer on behalf of the bridge company to complainant's petition (F.R. 100).

On the 8th day of December, 1933, an amendme was filed to the answer by the bridge company, alleging that John A. Thompson and others associated with him dominated and controlled Phoenix Finance System, Inc., and subsidiary or ancillary organizations and dominated and controlled the Iowa-Wisconsin Bridge Company, and while acting for said corporations and controlling the Iowa-Wisconsin Bridge Company, and its board of directors as a part of the scheme fraudulently procured bonds of the Iowa-Wisconsin Bridge Company by cancellation of bridge company stock (F.R. 67-68).

Subpoena directed to Phoenix Finance Corporation, making it a party, was duly served on said corporation (F.R. 87-88). It appeared (F.R. 89).

As stated by the Circuit Court of Appeals:

"Inasmuch as the District Court found that Phoenix Finance Corporation was in all respects, so far as concerns this case, the successor of Phoenix Finance System, Inc., and managed by the same

officers, both corporations are hereinafter indiscriminately referred to as Phoenix" (98 Fed. (2) 416, at 419).

On February 23, 1934, Phoenix Finance Corporation filed an answer to the petition of intervention on information and belief denying all the allegations thereof, and alleging that it was the *owner and holder for value of a large amount of bonds of the Iowa-Wisconsin Bridge Company* issued in accordance with the mortgage declared on in the bill of foreclosure, asked "that its rights as holder of bonds be fully protected" and prayed for general equitable relief. (Emphasis supplied.) (F.R. 91-92.)

The trustees filed reply to the petition of intervention denying the allegations thereof and pleading ratification by the corporation by payment of *interest on bonds*, and estoppel from asserting the invalidity of the mortgage *or bonds*, as to both the corporation and its stockholders (F.R. 102-103).

Petitioner on page 14 of its brief states: "There were no pleadings of any character directed against or naming Phoenix Finance Corporation, this petitioner," and that it was made a party by *ex parte* statements.

Phoenix Finance Corporation was already a party in the lawsuit by representation by the trustees, with all the pleadings applying, and as such a party by representation was bound by the proceedings in the case. The statement that Phoenix Finance Corporation had succeeded Phoenix Finance System, Inc., was made by complainant's counsel, who were of Phoenix Finance Corporation's selection. and the court upon such succession appearing properly ordered the Phoenix Finance Corporation to be made a party, and upon it thus being made

a party the pleadings on file applied to it, as fully as though the petition of intervention had been amended, inserting its name therein in lieu of that of Phoenix Finance System, Inc. It made no objection to being made a party; did not move for further pleading, but filed answer to the petition of intervention and the trial proceeded, and it is too late to object in supplemental proceedings that additional pleadings or amendments were not filed. The Phoenix Finance Corporation is bound without them. *5.

Petitioner on page 14 of its brief asserts: "The relationship between these corporations was simply that of vendor and vendee, respectively, of certain assets."

This assertion is in direct contravention of the court's finding No. 41 (F.R. 202) in the original trial, "That Phoenix Finance Corporation, at the time of its organization was officered and controlled by the same officers as Phoenix Finance System, Inc., and took over the succession of both assets and liabilities with full notice of the facts and circumstances surrounding the bond issue in controversy in this case, and assumed the entire fruits and activities of its predecessor, so far as

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*5. **Himes v. Smith** (6 C.C.A.), 270 Fed. 132, cert. den. 255 U. S. 576, 41 S. Ct. 448, 65 L. ed. 792.

Davis v. Zirkle, 80 Ind. A. 396, 138 N. E. 266.

Crary v. Kurtz, 132 Iowa 105, 107, 105 N. W. 990.

Nome & Sinook v. Ames Merc. Co. (9 C.C.A.), 187 Fed. 928.

Bell v. Corbin, 146 Ind. 269, 36 N. E. 23.

See 34 C. J., Sec. 1410, p. 994.

Rule 15-b of the Rules of Civil Procedure provides:

"When issues not raised by the pleadings are tried by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the pleadings."

Also see Rule 12-h, Rules of Civil Procedure.

concerns this case, and proceeded to carry on with the same notice and purpose, adopting all the plans and results of its predecessor."

This finding was approved by the Circuit Court of Appeals on the first appeal (F.R. 1610), in which certiorari was denied by this court, and is *res judicata,* not subject to re-examination in this ancillary proceeding. The record shows that purported bridge company bonds held by Phoenix Finance Corporation were by resolution of the board of directors of the bridge company while controlled by John A. Thompson, president of both Phoenix Finance System, Inc., and Phoenix Finance Corporation, and his associates on March 7, 1932, directed to be delivered to the Phoenix Finance System, Inc., in payment of alleged obligations of the bridge company to Phoenix Finance System, Inc., found fraudulent and without consideration by the court on the original trial (F.R. 201-202, 979 to 982).

Through like control the board of directors of the bridge company by resolution on July 8, 1933, directed $20,100 additional bonds of the bridge company to be delivered to Phoenix Finance Corporation as collateral security for the payment of obligations originating with the Phoenix Finance System, Inc., and to pay interest on fraudulent bonds and some other items found without consideration by the court on the original trial (F.R. 1027-1029; bottom 203, top 204; bottom 1704, top 1705). The record shows that the Phoenix Finance Corporation took up the conspiracy where the Phoenix Finance System, Inc., left off. The bond issue and mortgage securing it were all the result of a single deliberate fraudulent scheme to obtain possession of the bridge and freeze out its stockholders, starting with the $50,-

000 mortgage and culminating with the foreclosure proceedings, and participated in by both Phoenix Finance System, Inc., and its successor, Phoenix Finance Corporation. (Opinion District Court F.R. 157, 412-413; opinion Circuit Court of Appeals F.R. 1708.) The court's original findings are fully sustained and are *res judicata* and we do not feel justified in pursuing the matter further. *6.

On April 24, 1934, the court entered an order that Phoenix Finance Corporation produce all of its books and records pertaining to the business and affairs of the Iowa-Wisconsin Bridge Company (F.R. 97-98), but such books and records were never produced (F.R. 614-616, bottom 396, top 397; 552; 675; bottom 635, top 636; 425; 434 interrogatory 200; 435 interrogatory 202).

Other stockholders of the bridge company, residents of Iowa, intervened, and adopted the pleadings filed by Kendrick (F.R. 106-107).

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*6. Where several persons combine to carry out a fraudulent conspiracy to cheat another, each and all of such persons are liable to the defrauded party, without reference to the amount of the fruits of the fraudulent transaction he obtains, or the degree of his activity in the scheme. * * * It is not necessary that they be in pari delicto. It is enough that each was at some time and in some degree a party and an aider of the improper transaction. Fletcher Cyc. of Corp. (Perm. ed.), Vol. 1, Sec. 198, pp. 650-655; **McCandless v. Furland**, 296 U. S. 140, 56 S. Ct. 41; **Irving Trust Co. v. Deutsch** (C.C.A.), 73 Fed. (2) 121, 123; **Jackson v. Smith**, 254 U. S. 586, 41 S. Ct. 200, 65 L. ed. 418.

Appointment of and Proceedings Before Master.

On December 5, 1934, counsel for the parties agreeing, the court appointed a special master and entered an order of reference, which provided:

> "It is ordered that this cause be and it hereby is referred to Honorable J. W. Kindig, Special Master in Chancery, to hear all of the issues in this cause, to take the evidence and proofs according to law, to examine the questions in issue and to report from said evidence his findings of fact and conclusions of law in respect to all of the issues herein, *to report his conclusions as to whether the evidence and pleadings entitle complainants or the other parties herein to the relief or any part thereof, prayed for in their respective pleadings,* and to perform all such other lawful services as may be necessary or proper in the premises, etc." (F.R. 107). (Emphasis supplied.)

On the trial before the Master the trustees appeared by the attorneys selected by the Phoenix Finance Corporation, and the Phoeonix appeared by attorney W. B. Sloan (F.R. 531), and Mr. Sloan took part and objected to testimony (F.R. 637, 656, 659, 650-651).

The complainants called John A. Thompson, president of complainant, Phoenix Finance Corporation, in their main case, who testified as to claimed considerations for the bonds, and who was cross examined on that subject. (Direct examination F.R. 538-542; cross examination F.R. 542 to 545; cross examination on part of interveners, F.R. 545-556; cross examination, F.R. 560-561; further cross examination, F.R. 562-564; further cross examination on part of interveners, F.R. 633-637; F.R. 673-675; further direct examination of Mr. Thompson on part of complainants in rebuttal, F.R. 675-678; cross ex-

amination on part of interveners, F.R. bottom 678-685; F.R. 691.)

The claimed considerations involved in the case are summarized in the first decision of the Circuit Court of Appeals, as follows, to-wit:

"The consideration claimed by appellants to have been paid by the parties to whom the bonds were issued may be summarized as follows:

"To Phoenix in consideration of

1.	In exchange for its mortgage dated March 10, 1931,		
	Principal of mortgage	$50,000.00	
	Accrued interest	3,548.56	
	Allowance to give 8% yield on bonds	12,727.31	
			66,275.87
2.	For advancements under guaranty contract of November 10, 1930, To Industrial Contracting Co.	10,000.00	
	to McClintic-Marshall Co.	11,262.71	
			21,262.71
3.	Paid Kramer & Hogg to discharge mechanic's lien		9,000.00
4.	Cash		461.42
5.	In exchange for 517 shares of bridge company stock with accrued interest		60,500.00
6.	As security for payment of taxes	3,125.00	
	Advancements	14,610.19	
		17,735.19	
			20,100.00

To attorneys as security for fee of	4,000.00	10,000.00
To Anderson for claim of	6,000.00	7,400.00
To five claimants for	5,000.00	5,000.00
	$15,000.00	$200,000.00

"It will be observed that of the total issue $22,400 of bonds were issued as security or in payment of claims against the bridge company by claimants other than Phoenix for obligations aggregating $15,000.00, and the remainder of the bonds in the sum of $177,600 were issued to Phoenix. The court and the Master found that the $15,000 of claims were meritorious, and the decree provided for their payment by the receiver.

"The important issue in the case is the question of the sufficiency of the consideration for the $177,600 of bonds issued to Phoenix" (F.R. 1689 at 1700-1707; 92 Fed. (2) 416 at 424).

The above $461.42 being charged to the account of Phoenix on the books of the bridge company (F.R. 981).

The complainants by the testimony of their witness, John A. Thompson, president of the Phoenix Finance Corporation, claimed consideration for the bonds, as shown in the above summary. As to items 1, 2, 3 and 4 of said summary, see Thompson testimony on part of complainants (F.R. 541) and the minutes referred to in said testimony appearing in Exhibit 6 (H.L.B.) were offered in evidence by complainants (F.R. 979-981; F.R. 539; and Thompson testimony F.R. 562-563; and Exhibit A-2 H.E.B. 843, offered 564.)

Item one of said summary is the mortgage involved herein (see ancillary bill, paragraph 3, R. 4, paragraph 6, R. 5, paragraphs 11 and 12, R. 10, and Exhibits SC-6 and

SC-7, R. 374-385, offered R. 268 to 269.) Item two are the items involved in one Delaware suit herein involved. (See ancillary bill as amended, paragraph 7, sub (d), R. 7 and R. 98-99, and Exhibit SC-4, R. 320-339; particularly 334, offered R. 267-268.)

As to item five of said summary, see Thompson's testimony on part of complainants (F.R. 541). Said item five is involved in the Delaware suit in chancery, herein involved. (See ancillary bill, paragraph 3, R. 4, paragraph 7, sub. (b), R. 6, and Exhibit SC-2, R. 301-307, offered R. 267.)

As to item six of said summary as claimed consideration, see Thompson's testimony on part of complainants. (F.R. 542, 563, and Ex. A-2, H.E.B., F.R. 843-844, offered F.R. 564, Ex. 28, H.E.B., F.R. 829, offered F.R. 562, and see F.R. 563, and F.R. 540.) Said item six of the summary includes the items of three Delaware suits involved herein. (See ancillary bill as amended, paragraph 7, sub (a), R. 5-6, paragraph 7, sub (c), R. 6 and 98, paragraph 7, sub (e), R. 7 and 99, and Exhibit SC-1, R. 294-300, offered R. 266, and Ex. SC-3, R. 307-319, offered R. 267, and Ex. SC-5, R. 340-373, particularly 343, offered R. 268.)

A large amount of testimony, depositions and exhibits were offered in evidence, as shown by the five volumes of the first record. Written briefs and arguments were filed (F.R. 693).

No Misunderstanding Submission to Master.

At the conclusion of the evidence the Master fixed a time for complainants to file briefs and arguments and likewise time for the filing of interveners' brief and de-

fendant's brief, and stated: *"I would like to have the theory of all parties definitely in reference to the consideration"* (F.R. 693).

The case was finally orally argued before the Master on October 25, 1935, and submitted in its entirety (F.R. 694).

Complainants' counsel in such oral argument stated:

> "Mr. Fowler: There is a question in this case as to whether or not at this particular time the Master should recommend that a decree of foreclosure be entered, and the question of which of the bonds are to participate be reserved or taken up at a later date. *I don't suggest for a minute that this testimony will have to be reopened.* It is whether we want to go at this in two parts. In other words, it is our contention that if any of these bonds are valid then the foreclosure must be ordered. Then the next question is which of the bonds must participate. * * *
>
> *"As I have said in our opening argument, I think under this record you can use your own judgment, the Master can use his own judgment as to whether he wants to decide this all at this time* or whether he wishes to make a recommendation to the court ordering a foreclosure of the mortgage, the determination of which bonds shall participate to be taken up at a later recommendation" (F.R. 694).

To this Mr. Ontjes, representing the interveners, said:

> *"Mr. Fowler talks about piece-meal trials. Your Honor, we didn't enter into this trial as any piece-meal proposition. We had no piece-meal ideas in our mind when Mr. Green and I presented our citation in this matter for the taking of these depositions and this evidence. It is our contention that we are trying and submitting this case in its entirety at this time,*

and if Your Honor feels, as we believe in this matter, that this mortgage and bond issue is fraudulent, then she flies out the window. There is no evidence here of any kind that anybody is an innocent holder of any of the bonds. Not a one. The record before you is that substantially, if not wholly, they are original payees of the bonds.

"Mr. Fowler: *We represent all the bondholders*" (F.R. 694-695).

Report of Master.

The Master filed his report on March 10, 1936. The Master found that John A. Thompson, president of Phoenix, dominated and controlled the bridge company, the Phoenix Finance System, Inc., and affiliated companies, and while thus controlling the bridge company took advantage of the bridge company for his controlled companies (F.R. 129-134). As to the first four items of bonds in the above summary amounting to $97,000.00, he found: That $97,000 of the bonds were transferred by the corporation to Thompson or his controlled companies on pretended book account originating out of the pretended $50,000 mortgage and pretended obligations of the bridge company, none of which were actual, except $9,000 paid to Kramer & Hogg. "That although the contract between the bridge company and the said Shaffer & Company (contractors) provided for a surety bond to insure the obligations of the said Shaffer & Company, yet the said Thompson, in manipulating and scheming and conspiring, omitted having the said Shaffer & Company furnish such bond, and that under the pretended bond, the said John W. Shaffer (John A. Thompson), through his controlled companies, pretended to perform the obligations which the said Shaffer & Company should have performed. That the said Thompson and his companies

did not, in fact, perform such obligation on behalf of the said Shaffer & Company, but simply built up a pretense on the books of the various companies to make it falsely appear that the said Shaffer & Company failed to perform its duty, and that the said Thompson, or his controlled companies expended the said $97,000 in so doing. But, as a matter of fact, the said Thompson and his controlled companies did not thus expend $97,000, but only expended the said $9,000 thereof paid to Kramer & Hogg, as aforesaid, and therefore there was no consideration for $88,000 of the said $97,000 of the bridge company bonds thus issued to the said Thompson or to his controlled companies" (F.R. 130-131). That the resolutions pretended to have been passed by the bridge company authorizing the said $97,000 issue of bonds were not genuine legal resolutions so far as the same related to said $88,000 of said bonds, but were adopted through the influence and connivance of Thompson and his associates, so far as they were concerned, and independent stockholders and directors who supported the resolution did so not knowing of the true facts relating thereto, but were deceived and misled by the misrepresentations of Thompson and the resolutions were invalid and of no effect (F.R. 132).

As to item five of the bonds in the above summary, the Master found *they were fraudulently obtained by the exchange and cancellation of 517 shares of bridge company stock* (F.R. 130). As to item six in the above summary of $20,100 of bonds, the Master found that they were without consideration except as to $3,125 (F.R. 133-134).

Exceptions to Master's Report.

The Iowa-Wisconsin Bridge Company and interveners filed exceptions to the Master's report as to said $9,000 and $3,125 issued to Phoenix Finance Corporation and as to foreclosure and as to assessment of partial costs (F.R. 148-155).

The trustees, by counsel of Phoenix's selection, filed exceptions to the Master's report (F.R. supp. trans. of record 3-14) asserting that said $97,000 of bonds were issued for good and valuable consideration (F.R. 12); and asserting that said $60,500 of bonds were issued for good and valuable consideration (F. R. 13); and that the said $20,100 of bonds were issued for good and valuable consideration (F. R. 13).

Phoenix Finance Corporation, appearing by W. B. Sloan and by additional counsel, filed voluminous exceptions to the Master's report, claiming basic considerations for all the bonds held by Phoenix (F.R. supp. trans. of record, 14-58, inc.). It was asserted in Phoenix' exception number five:

> "In support of this exception it asserts that the record discloses that the said $97,000 of bonds were in truth and in fact issued and delivered to it for a valid consideration, which valid consideration was the following:
>
> | | |
> |---|---|
> | Mortgage owing by the bridge company to Phoenix, dated March 10, 1931 | $50,000.00 |
> | Accrued interest on above mortgage | 3,222.22 |
> | Cash advanced to bridge company 11/11/31, Journal p. 58 (for payment to Kramer & Hogg) allowed by Master | 9,000.00 |
> | Cash advanced to bridge company 9/24/31, Journal p. 50 (for payment to Industrial Contracting Company) | 10,000.00 |

U. S. Treasury Certificate transferred to bridge company 12/24/31, Journal p. 62 (to make payment to McClintock-Marshall)	11,262.71
Interest on open account for the last three items above	326.34
Discount on bonds, so as to yield 6%	12,727.31
Charged to Phoenix on 3/15/32, Journal p. 76, so as to complete the balance	461.42
(Figure shown in Phoenix Finance Sheet No. 1 in Ex. 2, H. L. Bump, Notary Item Debit, March 15, said exhibit being the ledger of the Iowa-Wisconsin Bridge Co.)	
Total	$97,000.00

(F.R. Supp. (abb. for supp. trans. of record) 27.)

In said exception Phoenix claimed consideration for the $50,000 mortgage held fraudulent by the Master and the court (F.R. supp. 27; F.R. 130 to 132; F.R. 191-192). This same fraudulent mortgage dated March 10, 1931, for $50,000 was recorded in Allamakee County, Iowa, June 2, 1939 (see Exhibit SC-6, R. 374-378), and was recorded in Crawford County, Wisconsin, on the 18th day of May, 1939 (see Exhibit SC-7, R. 379-385) and is the one mentioned in paragraphs 11 and 12 of the supplemental and ancillary bill (R. 10 and 11).

The above items contained in Phoenix Finance Corporation's exception number five above quoted, Industrial Contracting Company $10,000 and McClintic-Marshall $11,262.71, total $21,262.71, are the same items as those involved in the Delaware action mentioned in paragraph 7(d) of the supplemental and ancillary bill as amended R. 7 and 98 and 99), and shown by the certified and ex-

emplified copy of the declaration in that Delaware action (see Exhibit SC-4, R. 320-339, particularly R. 334; also see court's findings 24, 25, 32, 33 and 40, F.R. 189 to 191, 194-196 and 201-202).

In Phoenix' exception number four they undertook to assert that said $60,500 of bonds were not procured fraudulently by cancellation of 517 shares of stock, but were based on consideration (F.R. supp. 23-26).

The court found that this stock was cancelled when Phoenix Finance Corporation fraudulently obtained the bonds and that it was not entitled to have it re-issued (F.R. 413). These same shares of stock are involved in the Delaware action as alleged in paragraph 3 of the supplemental and ancillary bill (R. 4), and shown by the certified exemplified copy of the declaration of such Delaware action (Exhibit SC-2, R. 301-307; also see court's finding, 39, F.R. 200-201).

In Phoenix' exception number six (F.R. 48-49), they undertook to assert that the aforesaid $20,100 of bonds had basic consideration, stating:

> "This pledge of $20,100.00 of Series B bonds were made by the bridge company to secure its four promissory notes to Phoenix Finance Corporation (Minutes, Exhibit 31, page 402, and intervener's chart, Exhibit B-28). The existence of these four notes, aggregating $17,735.19 principal amount, is without dispute in the record."

The notes are as follows:

(a) Note for $2,000.00 dated 12-15-1932, due 6-15-1933, at 8% represents cash borrowed and deposited to credit of bridge company in Iowa-Des Moines National Bank & Trust Company (see bridge company journal,

Exhibit 1, page 107, line 16, and bridge company ledger, Exhibit 2, notes payable account).

(b) Notes for $500.00 dated 12-31-1932, due 6-31-1933, at 8% to apply on account of cash and payment of bridge company debts by Phoenix Finance Corporation (see same journal, page 110, lines 5 to 7 and same ledger, notes payable account).

(c) Note for $3,125.00 dated 1-20-1933, due 7-20-1933, at 8% representing cash loaned and deposited by bridge company in Iowa-Des Moines National Bank & Trust Company (see same journal, page 114, lines 30 and 31, and same ledger, notes payable account).

(d) Note for $12,110.19, dated 7-7-1933, due on demand at 8% representing cash loaned to bridge company by direct transfer of cash and payment of bridge company debts by Phoenix Finance Corporation (see same journal, page 130, lines 1 to 12, and same ledger, notes payable account).

The execution and consideration for these four notes are corroborated and explained by bridge company minutes hereinafter referred to and by testimony of John A. Thompson, namely Thompson's Des Moines testimony, page 84, lines 16-21, as follows:

> "Then $20,100 being all of the remaining bonds, were issued as collateral to notes of the Phoenix Finance Corporation. These notes were for funds borrowed from Phoenix, the amount owing is $17,000 and some odd cents, and $12,000 note and some smaller notes" (F.R. supp. 48-49, also 49-51).

The notes and the alleged considerations therefor set forth in said Phoenix exception number six, quoted above

to-wit: one dated December 15, 1932, of $2,000.000 and one dated January 20, 1933, of $3,125.00, are the ones involved in the Delaware action as alleged in paragraph 7-a of the supplemental and ancillary bill (R. 5-6) and shown by the certified exemplified copy of the declaration in said Delaware action (Exhibit SC-1, R. 294-301, particularly see R. 298-299).

The notes and the alleged considerations set forth in said Phoenix exception number six quoted above, to-wit: one dated 7-7-1933, of $12,110.19 and one dated December 31, 1932, of $500.00 are the ones involved in the Delaware action as alleged in paragraph 7-e of the supplemental and ancillary bill as amended R. 7 and 98), and as shown by certified exemplified copy of the declaration in said Delaware action (Exhibit SC-3, R. 307-319, and particularly R. 316-317).

Opinion of Court, Findings and Decree.

The trial court filed its opinion, holding that all of the bonds issued to the Phoenix were issued without consideration and as a part of a fraudulent scheme, plan and conspiracy to cheat and defraud the bridge company and its stockholders out of their property (F.R. 156-179) and with respect to the Master's conclusion of law number five stated: "This conclusion of law is attached in the defendant and interveners' eighth exception. I think that insofar as the language of the Master's conclusion includes the $9,000 of bonds held valid in the hands of Phoenix Finance Corporation and the $3,125.00 of bonds held valid in the hands of Phoenix Finance Corporation, it is erroneous" (F.R. bottom 177; also see court's decree, F.R. bottom 203 to top 204).

The court in its findings of fact found all of the bonds held by Phoenix Finance Corporation to be without consideration, fraudulent and void, issued in fraudulent conspiracy (F. R. 179-202).

The court found that $15,000 in bonds held by individual parties other than Phoenix had consideration and in its decree made provision for them (F. R. 204). Part of such bonds were issued to Helmer Anderson and included Series B bonds numbers 98 and 97, which were allowed in part as alleged in paragraph 7(e) of the supplemental and ancillary bill as amended (R. 7-99), and as there alleged are the same bonds involved in the Delaware action alleged in said paragraph and as shown by Exhibit SC-5 (R. 340-373).

The decree, among other things, provides:

Jurisdiction is hereby reserved to deal with all matters arising under the receivership and in connection with adjustment and payment of taxes and counsel fees.

Motions of Phoenix and Trustees to Vacate Decree, for Dismissal, for Rehearing and for Modification of Decree.

On the 19th day of December, 1937, Phoenix Finance Corporation filed a motion to vacate, and expunge and set aside the decree, findings of fact, opinion, etc., on the claimed ground of want of jurisdiction (F.R. 204-205), to which motion the bridge company filed a resistance (F.R. 206-208). The motion was overruled (supp. opinion of the court, F. R. 208-211).

On January 29, 1937, the trustees filed a motion verified by John A. Thompson, president of Phoenix, for dismissal and in the alternative petition for rehear-

ing, division one claiming want of jurisdiction as claimed in Phoenix Finance Corporation's prior motion, and asking dismissal; division two in the alternative petition for rehearing, adopting the petition for rehearing of the Phoenix Finance Corporation (F.R. 211-214). On the same day, January 29, 1937, Phoenix Finance Corporation filed a petition verified by said John A. Thompson, President, for rehearing and in the alternative for modification of decree.

In this petition it was asserted:

> "That a serious and good faith misunderstanding occurred between the Master and counsel in the taking of the testimony as to the scope of the questions and issues which were on trial and the method of trial procedure which was proper to be followed."

That counsel believed that the only question properly to be considered was in reference to the validity of the mortgage deed of trust and the right of foreclosure thereunder, and that the question involving the validity of the bonds would be considered at a later date, and that it was not then necessary to introduce evidence before the Master on those questions. That as a result of such misunderstanding a large amount of material evidence as to the validity of the bonds was not introduced on behalf of complainants although available and could have been introduced, refuting all questions of fraudulent domination or control and establishing the validity and consideration of the mortgage and bonds. That

> "the Master reached his conclusions and made his findings of fact and law and recommendations without this evidence and this came before the court

and has been decided without this evidence. The facts in connection with this misunderstanding are as stated by the witnesses Chas. S. Bradshaw, Rex H. Fowler, W. B. Sloan, John A. Thompson, etc."

Attached thereto were some thirty alleged affidavits (F.R. 216-391).

We have no space in this brief to analyze the affidavits attached to the motion. Affiants John A. Thompson, John W. Shaffer, Margaret E. Lockhart, Oscar R. Thorson, M. White and Emory H. English testified at the trial. Their statements contained in their affidavits, except where they are entirely refuted by the documentray evidence in the case, and also by their own testimony given at the trial, consist largely of conclusions and opinions, which would be incompetent and inadmissible if offered in evidence, and could have had no weght to change the result as against the explicit documentary and other evidence offered at the trial. The affidavits of the other affiants were controverted in answer filed by interveners to said petitions. (F.R. 394-410; also refuted by testimony of John A. Thompson's deposition of May 10, 1934, F.R. 415-500.)

Petitioner in that part of its answer and counterclaim which was stricken, merely re-alleged the same claims as to alleged misunderstanding which had been asserted in the petition for rehearing, and on pages 14, 15 *and top of* 16 *of its brief merely re-asserts the statements contained in that petition as to the so-called "Two-Stage" theory in slightly modified language* (see F.R. 213, 214; 216-230, especially 217).

At the bottom of page 15 of its brief petitioner makes reference to defendants' Exhibit SC-106, which is not in evidence (R. 287).

Petitioner then on page 16 of its brief refers to an offer of testimony. Such proposed testimony was clearly incompetent and immaterial and in contravention of the record, and objection thereto was sustained.

Then on pages 17 and 18 of its brief petitioner refers to an *ex parte* statement of complainant trustees' counsel entitled "Suggestions" filed in connection with former petitior for writ of certiorari in this court, and then cites as record citations therefor (F.R. 224-230) claimed affidavits of said counsel attached to the same original petition for rehearing.

Then on pages 18 and 19 of its present brief petitioner quotes from affidavit of W. B. Sloan, counsel for Phoenix, filed as a part of the same petition for rehearing (F.R. 228-230).

In said petition for rehearing, it was asserted that the bridge company received full cash consideration for a large number of bonds held by Phoenix, which had been disallowed, amounting to $95,043.71 (F.R. 221), and the affidavit of Leo J. Skoner of the firm of Ernst & Ernst was attached in support thereof (F.R. 308-312). Like claims had been made in Phoenix' exceptions to the Master's report on claimed report of Ernst & Ernst in support thereof (Sup. R. 21-23) and the affidavit of Edgar S. Gage was also attached in support of said petition for rehearing (F.R. 271-276). Petitioner now, on pages 43 and 44 of its brief, refers to defendant's Exhibit SC 114, purported *ex parte* report of Ernst & Ernst, not a part of the record and to which objection was sustained (R. 292), and again makes like assertions about claimed indebtedness of the bridge company to Phoenix as made in Phoenix' exceptions to Master's report and in its petition for rehearing. That such assertions are mere repetitions of Phoenix' former assertions.

No allegation of diligence or that any evidence was newly discovered was contained in the petition. The petition prayed (F.R. 223):

> "First. That a rehearing be granted herein, and that it be given leave to present the new evidence aforesaid.
>
> "Second. In case rehearing is denied, then as alternative relief that the decree be modified so as to withhold from adjudication the question of the validity of the $50,000 mortgage given by the bridge company to petitioner, reserving the right to petitioner to litigate said mortgage in another action, if it so desired.
>
> "Third. In case rehearing is denied, the decree be so modified as to reinvest in petitioner 517 shares of 'A' stock surrendered in exchange for bonds.
>
> "Fourth. In case rehearing is denied, that the decree be modified so as to withhold from adjudication the right of petitioner to institute an action at law against the bridge company, if it so desires, for money had and received."

Answer to Petition for Rehearing.

On February 18, 1937, the bridge company and interveners filed answer to the petitions for rehearing and modification of decree (F.R. 394-398) supported by affidavits denying that there was any misunderstanding as to the issues tried before the Special Master, and stating that the consent order of reference in this cause referred the whole case and all matters involved therein to the Master. That the hearing before the Master involved the validity of the bonds, and the want of consideration, as well as the validity of the deed of trust. That the Master did not acquiesce in a limitation of the scope of the

hearing. That it was stated at the beginning of such hearing by interveners' counsel that the validity of all the alleged bonds and the want of consideration and the validity of the trust deed were involved in the trial. * * * That depositions were taken and evidence offered on all such issues. * * * That complainants had full opportunity to present all evidence on their part, and that there was no showing of any diligence on their part excusing the presenting of any evidence claimed to have any foundation or to be material. * * * That the cause was pending for about two years before the hearing before a Master, during which numerous depositions were taken with respect to the fraudulent issue of the bonds and the want of consideration of such bonds, and the fraudulent character of the deed of trust, which depositions were all filed six months or more before the trial and hearing before the Master commenced, and that complainants were at all times fully advised that all such matters were involved in the hearing and had full opportunity to present all evidence on their part. That all of the witnesses who made affidavits were known to and available to complainants at all times during the hearing, and that some of them were witnesses and testified by deposition or orally at the trial. That no single affidavit presented nor claimed to present newly discovered evidence. That the whole mass of affidavits constituted mere repetition and accumulation of evidence taken at the trial and contained in the record, or at least evidence which could have been offered if complainants had so desired. That the affidavit of John A. Thompson was contradicted by his testimony on trial. That the court made an order for the production of the books of the Phoenix Finance Corporation but the complainants resisted the making of such order and failed and refused

to produce the books of Phoenix Finance Corporation and that at all times during the taking of depositions and during the hearing before the Master, refused to produce such books and refused to produce the books of Phoenix Finance, Inc., and of Thompson & Company. That said John A. Thompson, as shown by the evidence, moved said records to Florida. That the complainants were given every opportunity during the taking of depositions and of the hearing before the Master to produce such books but refused to produce them, and that there is no showing of diligence on their part for failure to produce the alleged and pretended evidence referred to in petition for rehearing. That there was no misunderstanding, nor any inadvertence or oversight.

That the alleged $50,000 mortgage to the Phoenix Finance System, Inc., was made and was also released as a part of the fraudulent scheme, plan and conspiracy and that the 517 shares of capital stock surrendered to the bridge company were so turned over as a part of the fraudulent scheme, plan and conspiracy and to fraudulently procure from the bridge company $60,500 of bonds fraudulently issued and that such transactions were but part and parcel of the fraudulent scheme, plan and conspiracy and that the complainants are not entitled to have the fraudulent mortgage reinstated nor the stock returned. That money or property used to perpetrate a fraud cannot be recovered.

That the pretended evidence presented by the petitions and affidavits would not change the result (F.R. 394-398). That the whole field of alleged considerations of bonds was covered in the depositions taken preparatory to trial and in the evidence taken at the trial in detail (F.R. 405).

And the answer further otherwise fully answered all of the claims of the petition for rehearing and modification of decree (F.R. 394-410). (Also see John A. Thompson deposition taken prior to trial (F.R. 414-500).) *7.

Order of Court on Motions of Trustees and Phoenix.

On the 18th day of February, 1937, the motion of Phoenix and the trustees to vacate the decree for want of jurisdiction and petitions for rehearing were heard and on the 4th day of March, 1937, the court filed its order and opinion, denying said motion and petitions (F.R. 411-413). The court in its opinion stated:

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*7. Rehearing in equity cases will be denied when the grounds offered pertain to matters of evidence which could just as well have been produced on the trial already had and the evidence sought to be introduced is not newly discovered, but was known to counsel before final hearing.

Hicks v. Otto (C.C.S.D.N.Y.), 85 Fed. 728.

Acme Flexible Clasp Co. v. Cary Mfg. Co. (C.C.S.D. N.Y.), 99 Fed. 500.

Central Trust Co. of N. Y. v. Worcester Cycle Co. (C.C. Conn.), 91 Fed. 212.

In the case of Pittsburgh Reduction Co. v. Cowles Elec. Co. (C.C.N.D. Ohio), 64 Fed. 125, the court in its opinion on pages 127 and 128 says:

> "The ground of the first paragraph of the motion as elucidated in the oral presentation of it is peculiar. It is, in effect, that complainants' counsel by their argument misled the defendant and its counsel into taking a wrong view as to the issue of the cause; now, having discovered the real issue to be something other than it was supposed to be, **defendant wishes to adduce more evidence** and make further argument on the new issue heretofore successfully obscured and concealed from the defendant, its counsel and the court by the ingenuity of complainants' counsel. Defendant's **present** counsel expressly disclaims the slightest intention to impeach the good faith or professional skill of defendant's former counsel, but merely contend that in this case the arguments on behalf of complainants were so persistently sophistical and calculated to mislead that a serious mistake was made by the solicitors for defendant."

"The petition for rehearing filed by Phoenix Finance Corporation and adopted by the plaintiff trustees, rests upon the claim that the Master to whom the cause was referred in its entirety, received the submission under a misapprehension, and that the plaintiffs had also been of impression that they were to take further testimony at some future time when they submitted their bonds to the Master or to the court. They further contend that the cause in behalf of the trustees and the Phoenix Finance Corporation was mismanaged by their counsel, and that now having taken in new blood at the bar, the present counsel should be given a chance to try the case over.

"Having in mind the analogy of petitions for rehearing in equity cases and motions for new trial in law causes, the court is unable to find any substantial merit in any of the claims for a rehearing. The defense interposed to the plaintiffs' cause of action was that the bond issue and mortgage securing the same were all a part of a deliberate fraudulent scheme to obtain possession and ownership of the bridge after its completion and freeze out all of the stockholders. This scheme as alleged and as proven, dated back to the inception of a certain $50,000 mortgage, and proceeded forward including the plans and their execution for the issuing of the bonds and mortgaging of the bridge. During all of this time the Phoenix Finance System, Inc., and its successor, Phoenix Finance Corporation, and the bridge company had interlocking directorates. The so-called Thompson interests predominated in all of them. As the Master pointed out in his fourth conclusion of law, in the circumstances with the charge of fraud and conspiracy made, the burden was on the plaintiffs who had brought the suit at the instance of the Phoenix corporations, to show clean hands and fair dealing. This the plaintiffs not only failed to do, but throughout combatted the inter-

veners who were permitted to defend in behalf of the bridge company. The interveners obtained an order of court for the production of the books and records of the Phoenix Finance Corporation before the Master, but Phoenix Finance Corporation vigorously and successfully it appears prevented the production of those books and records, and its officer when on the stand before the Master, declared his inability to produce, for they had been sent to the State of Florida. It is now with poor grace that the plaintiffs invoke the discretion of the court for a rehearing in order to use those very books and records. Anticipating an adverse ruling, the petitioners alternatively pray for a modification of the decree with provisions commanding the re-issuing of certain shares of stock to Phoenix Finance Corporation, which it cancelled when fraudulently obtaining the bonds. One might conceive some invidious analogies to this situation. Having attempted the strong box of another, and being hoist by what is now claimed to be a premature explosion, they volubly invoke the compassion of the court to restore valuable implements of their craft left behind. I see no reason why a court of equity should be deeply concerned in giving an affirmative relief to the Phoenix Finance Corporation. On the other hand, I think the petitions for rehearing should be denied and the motion to dismiss and vacate the decree overruled, and it will be so ordered" (F.R. 412-413).

This ruling of the court was assigned as error on appeal (trustees' assignments 24 and 26, F.R. 507), (Phoenix' assignments 60, 61, 62, 63, 64, 65, F.R. 527, 528), and was affirmed and is *res judicata of the fact that there was no misunderstanding in the submission before the Master and is res judicata of the other matters*

covered by said ruling and now attempted to be again asserted by petitioner, and finally disposed of the matters discussed by petition on pages 44, 45 and 46 of its brief.

The decision is *res judicata* of the assertions made in petitioner's brief on pages 46, 47, 48, 49, 51 and 52 as to its claim that the books were produced as required by the order, and that copies of pertinent entries were furnished counsel for interveners. The petitioner in support of those assertions refers back to pages of the first record, all of which were before the court when the original decision was made. Petitioner attempts to explain away the admissions of non-production of the books contained in the testimony of Phoenix officers, John A. Thompson and Emory H. English in the first record. That is a mere re-argument of the petition for rehearing. That testimony was passed on in the original decision, *which is res judicata that the books were not produced*, and cannot be collaterally attacked as was attempted by petitioner. If, as now claimed, the books were produced prior to, or at the time of the original hearing in 1935, and copies of entries furnished, it is strange that the president of Phoenix and its counsel could not think of that at the time of the hearing of the petition for rehearing, when it was directly stated in the answer to the petition, supported by affidavit, that they were not produced.

There was no motion filed by complainants to set aside the decision on the ground that the books were prduced, nor was that claimed on appeal from that decision. Such production is claimed for the first time in

this ancillary proceeding (R. 166). The fact is neither the books nor any entries therefrom were produced. The record fully sustains the court's decision. *8. (F.R. 613; 614-615; F.R. 97-98; F.R. 552, 675; 635-636; 414-500, particularly F.R. 425-427, interrogatory 200 F.R. 434; interrogatory 202, F.R. 435; answer to petition for rehearing paragraph 5, F.R. 396-397.)

Paragraph 43 of petitioner's answer and counterclaim to ancillary bill quoted on page 48 of its brief which was stricken is not responsive to the ancillary bill, in contravention of the decision and an attempted collateral attack upon it and a mere attempt to re-litigate what was decided on petition for rehearing.

Phoenix Fully Represented at Trial.

Petitioner on page 19 of its brief asserts:

"While Mr. Sloan's name appears at the opening of the hearing before the Master, he examined no witnesses and directed no cross examination and made but one ob-

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*8. Emory H. English, vice-president and director of the Phoenix Finance Corporation, testified on his deposition taken November 27, 1934 (F.R. 613): "I was vice-president of Phoenix Finance System, Inc., from October, 1928, until some time during 1932. The records of Phoenix Finance Corporation are at St. Petersburg, Florida. With respect to the minute book and records of the Phoenix Finance Corporation bearing on the succession of the Phoenix Finance Corporation in the holding of the bonds involved in this suit, those records are all in the hands of the president and secretary and not in my possession nor under my control. I do not have possession of the stock records of the Phoenix Finance Corporation to show the manner of succession to Phoenix Finance System, Inc., and the manner in which this transfer was made as relating to the bonds. I do not have any way to bring those books here, no authority over them. My duties are in relation to the loan department. Q. They are all in the possession of John A. Thompson and M. K. Thompson, as I understand? A. ..... None of those books and records of the Phoenix Finance Corporation as they relate to its holdings of bonds involved in this suit are in Des Moines, nor have they been during the year

jection to evidence." That is a deliberate misstatement of the record. He not only made the objection cited by petitioner, but made numerous other objections while interveners were offering their evidence and argued the admissibility of evidence (F.R. 656, 659, 660, 661). The record has been reduced to narrative form and for this reason all the examinations, objections, arguments and statements made by counsel during the trial do not appear. Therefore it does not appear from the record how many objections and arguments were made by Mr. Sloan in addition to those appearing on the pages just cited.

The following very significant statement by Mr. Sloan appears in the record (F.R. 660):

1934 to my knowledge unless Mr. Thompson may have had some of the books with him on some trip and may have carried it back, but I never saw it and I don't know anything about it. (F.R. 614-615.) (The order for their production was entered April 24, 1934, which directed their production within ten days, F.R. 97-98.) I do not have in my possession or under my control the instrument or instruments by which the assets of Phoenix Finance Corporation were transferred or passed over to the Phoenix Finance Corporation. I presume they are in the same place. I never saw them. I as vice-president am unable to produce them. Q. Will you as vice-president communicate with Mr. Thompson to produce those books? A. It would be beyond the scope of my authority; I could not direct him. I don't know whether I have control of any of the bonds of the bridge company involved in this action or not. Some of those bonds are in the safety deposit box in the bank. I have never handled the bonds except when I first signed them as an officer of the bridge company. I never received them from the bridge company. I didn't deposit them at the bank and I don't think that I have control over them. I have not looked for the books of the Phoenix Finance System, Inc., for March, 1931." (F.R. 615-616.)

John A. Thompson testified on the trial: "I will not produce the books of the Phoenix Finance System, Inc., for the month of March, 1931. These are the books that are in Florida. Mr. T. V. Kiernan has charge of the books in Florida. He is an attorney. He does some of our work, but not our principal attorney. (F.R. 552.) T. V. Kiernan is my brother-in-law. (F.R. 675.) T. V. Kiernan is the one who has charge of the books of the Phoenix Finance System, Inc., which are in Florida. He spends practically all of his time at the

"The Master: This is admitted on the limited question of waiver and whether this witness waived the right to object to the *bond issue in view of complainants' pleading of waiver.*

"Mr. Sloan: If the Master please, we have *not pled* that any individual stockholder waived anything. *We pleaded* that the corporation, by virtue of its conduct here, has elected to take certain corporate procedure and *is estopped from asserting the invalidity of the bonds;* that there is no mention made as to any individual stockholder coming in and claiming that the records are fraudulently kept and don't mean what they say. There is no issue of that kind at all."

There was no pleading of estoppel by Phoenix in its answer (F.R. 91-92). The plea of estoppel was in the complainant trustees' reply to the petition of interven-

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office of the corporations in which I am interested in in Florida and those books are in the same building that my office is in, but not in the same room. The original minute book of the Phoenix Finance Corporation is in St. Petersburg. (F.R. 635-636.) (Also see John A. Thompson deposition taken May, 1934, F.R. 414-500, particularly F.R. 425-427, interrogatory 200, F.R. 434, interrogatory 202, F.R. 435.)

The answer of the bridge company and interveners to petition for re-hearing stated:

"This court made an order for the production of books and papers of the Phoenix Finance Corporation prior to trial; that the complainants resisted the making of such order and following the making of such order failed and refused to produce the books and records of the Phoenix Finance Corporation and have at all times during the taking of the depositions and during the hearing before the Master refused to produce such books and papers and refused to produce the books of the Phoenix Finance System, Inc., and of Thompson & Company; that the said John A. Thompson, as shown by the evidence, moved such records to Florida; that the complainants were given every opportunity during the taking of the depositions and on the hearing before the Master to produce such books and records for examination, but at all times refused to produce them and wilfully and deliberately refused to produce them in evidence." (This answer was duly supported by affidavit, F.R. 396-399.)

tion (F.R. 103). It is apparent from Mr. Sloan's statements "We have not pled," "We plead," etc., that he and the trustees' attorneys were acting together and that they considered the trustees' pleadings the pleadings of Phoenix. The attorneys for the trustees, of Phoenix' selection, represented the bondholders, the parties interested in the lawsuit. The bondholders had the interest, not the trustees. The attorneys for the trustees were the original attorneys and naturally acted as chief counsel.

The record shows that Mr. Sloan filed his appearance for Phoenix (F.R. 89) and answer for it (F.R. 91-92). The Master gave him notice of the hearing before him (F.R. 113). His appearance is properly noted as present at the trial (F.R. 531). It is also noted at the taking of a deposition (F.R. 414). He signed Phoenix' exceptions to the Master's report (F.R. Sup. 58) and Phoenix' motion to vacate decree (F.R. 205), along with other counsel for Phoenix and Phoenix' petition for rehearing (F.R. 223) and most of the affidavits thereto attached recite that they were made at his and Mr. Senneff's requests (F.R. 257, 259, 261, 263, 267, 271). The trustees through their counsel adopted Phoenix' petition for rehearing (F.R. 214). He worked in harmony with counsel for trustees and along the same line. (See his and their objections to testimony on part of intervener, F.R. 658-661.) They were both selected by the same party, Phoenix.

Petitioner at page 21 of its brief states: "At the hearing before the Master Mr. Fowler gave specific notice that he did not represent Phoenix." That is a misstatement of the record. Turning to the citation given therefor (F.R. 669) it will be noted that Mr. Fowler said that he did not represent the Phoenix Finance System, Inc., on December 22, 1931, when bridge company directors

adopted a resolution, not that he did not represent Phoenix as counsel for the trustees at the trial before the Master in 1935. Upon submission before the Master he said: "We represent all the bondholders" (F.R. 695).

Petitioner asserts on page 48 of its brief that counsel for the interveners and for the bridge company before the Master and on exceptions to the Master's report repeatedly asserted and represented that the indebtedness of the bridge company to any bondholder was not in issue and could not be adjudicated in such foreclosure proceedings, and refers to page 40 of its answer and counterclaim (R. 165) stricken, asserting that such statements were relied on. These statements are not supported by the record.

The petition of intervention as amended alleged that the bonds were issued without consideration in a fraudulent scheme and conspiracy with intent to cheat and defraud the bridge company and it stockholders out of their property (F.R. 73-83; 100-102). None of such allegations were withdrawn. Phoenix' answer denied the allegations thereof and alleged "That it is the owner and holder *for value* of a large amount of the bonds of the Iowa-Wisconsin Bridge Company, etc" (F.R. 91). That answer was not amended nor withdrawn. The trustees replied denying the allegations of the petition of intervention (F.R. 102-103). That was not amended nor withdrawn nor were the allegations of consideration contained in the bill of complaint nor prayer for deficiency judgment withdrawn. Complainants called Phoenix' president, Thompson, to prove the claimed considerations for the bonds (R. 538-545). He was cross examined and further cross examined by interveners' counsel to show want of consideration for the bonds. (F.R. 545-556, 560-561, 564, 633-637, 651-653, 673-675; further examina-

tion by complainants' counsel 676-678; further cross examination on same subject of considerations by interveners' counsel, F.R. 678-685, 691, at which point the case closed.)

Interveners continued to introduce evidence to show want of consideration until the conclusion of the trial (F.R. 561-691.) The Master then stated: "I would like to have the theory of all parties definitely in reference to the consideration" (F.R. 693). Both the Master and the court passed on the question of considerations for the bonds and the court awarded recovery to the extent of considerations actually received by the bridge company. The trustees and Phoenix filed exceptions to the Master's report, reiterating all the claimed considerations of Phoenix for bonds in detail (F.R. supp. 2 to 14 and 14-58, particularly F.R. supp. 27-30, 48-49). They continuously asserted that the considerations of the bonds were in issue and presented them as in issue. On appeal they re-asserted the claimed considerations (trustees' assignments, F.R. 502-507; Phoenix' assignments F.R. 508-528; Circuit Court of Appeals' decision, F.R. 1689-1709). Neither in their exceptions to the Master's report, nor in their petition for rehearing nor on their first appeal did trustees or Phoenix claim that counsel for the interveners and for the bridge company represented that the consideration was not in issue nor that they relied on any such claimed representations. The record shows the contrary. In their petition for rehearing they asked to have the decree modified to withhold from adjudication the question of consideration, but made no claim whatsoever that they had in any manner been misled by or relied on any statement made by interveners' counsel or by bridge company's counsel, nor was any such

claim made on appeal. Any such claim would have had to have been asserted promptly, and cannot be asserted in a collateral attack on the orders and decrees, and the allegations of paragraph 40 of Phoenix' answer and counter-claim to ancillary bill stricken are in contravention of the record and a mere attempted collateral attack upon it. Trustees and Phoenix continuously asserted that the considerations for the bonds were in issue until there was a final determination against them was affirmed by the Circuit Court of Appeals. *9.

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*9. Petitioner in its note 28 on pages 48 and 49 of its brief avails itself of going outside the record with a statement, "At the trial of the supplemental and ancillary cause counsel for the bridge company asked the court to take judicial notice of all records, papers and files in the cause. The proof thus available is as follows:" and then proceeds outside the record with the making of claimed excerpt statements of counsel for interveners and statements of counsel for the bridge company separated from their context. That is a mere pretext for going outside the record. Rule 75 of the Rules of Civil Procedure requires parties to file their respective designations as to what is to be included in the record. Petitioner's counsel knows of this rule since he filed a designation in this cause (R. 727-732), which did not include the claimed excerpt statements. If he had made such designations respondent would naturally have included other portions of the record, which would have fully explained and refuted the implications of the portions quoted by petitioner and shown that the briefs of trustees and Phoenix contained statements completely refuting their present statements. From what has been said on this point by respondent it is obvious that neither the trustees, the Phoenix, the Master nor the court paid any attention to such claimed statements. What the bridge company's counsel stated in oral argument is immaterial since both the court and the Master found that the bridge company was under the dominant control of John A. Thompson, president of Phoenix, and was not making a good faith defense, and would not have to make a good faith defense to the complainant's action had not the interveners intervened. (F.R. 134 and 160.) The present counsel of bridge company were not then counsel for it, but were counsel for interveners.

The case of Thomas v. Brownville, Ft. Ky. Pac. R. Co., 109 U. S. 522, 3 S. Ct. 316, which holds "To the extent of the benefit conferred upon and received by the corporation in the construction of the railroad, the bonds issued in payment thereof are not void, and in suit to foreclose the mortgage by which they are secured, a decree for that amount should be allowed" (quoted from syllabus), was cited by interveners in their brief filed with the District Court on exceptions for different times in support of the proposition that the bonds being fraudulent, recovery could only be had on them on a quantum meruit basis to the extent of actual consideration received by the bridge company. (Respondent's brief filed with trial court 15, 270, 271, 272, 276.) This brief also cited Speers Sand & Clay Works v. American Trust Company (4 C.C.A.), 20 Fed. (2) 233, to the proposition that the validity and consideration of the bonds had to be first determined before there could be any foreclosure. (Same brief 12 and 14.)

Petitioner asserts that counsel for interveners "At Dubuque hearing on February 17, 1937, asserted that the $50,000 mortgage could not possibly be adjudicated in the foreclosure cause, and that any right of Phoenix to the 517 shares of stock was a matter for the state courts to pass upon." This is a deliberate misstatement of the record. Phoenix filed petition for re-hearing and modification of decree on January 23, 1937, in which it asked in the alternative "that the decree be modified so as to withhold from adjudication the question of the validity of the $50,000 mortgage given by the bridge company to petitioner, reserving the right to petitioner to litigate said mortgage in another court if it so desires," and that "The decree be so modified as to reinvest in petitioner 517 shares of Class 'A' stock surrendered in exchange for bonds." (F.R. 222; filing date, F.R. 391.) Interveners filed an answer thereto on the 18th day of February, 1937, in which it was asserted: "That the alleged $50,000 mortgage to the Phoenix Finance Corporation was made and was also released as a part of the fraudulent scheme, plan and conspiracy, and that the 517 shares of capital stock surrendered to the bridge company were so turned over as part of the fraudulent scheme, plan and conspiracy and to fraudulently procure from the bridge company $80,000 of bonds fraudulently issued, and that such transactions were part and parcel of the scheme, plan and conspiracy, and that complainants are not entitled to have the fraudulent mortgage reinstated nor the stock returned. That money or property used to perpetrate a fraud cannot be recovered. * * * That the matters involved in this action have been fully tried and adjudicated and that complainants are not entitled to have anything excepted from the force of such adjudication." (F.R. 398; filing date F.R. 410.) The hearing thereof was had on the 18th day of February, 1938. (F.R. 411.) There was no hearing at Dubuque on the 17th of February as asserted by petitioner. Petitioner Phoenix was asking to have the matters withheld from adjudication and interveners were contending that they had been fully adjudicated, so it is obvious that under such circumstances the interveners' counsel would not make the statement now claimed by petitioner Phoenix, and that the claimed statement is nothing short of a fabrication.

Petitioner at bottom of page 52 and pages 53, 54 and 55 of its brief refers to paragraphs 18 to 39 of its answer entitled sixth defense and counter-claim and seventh defense, stricken by the court. The allegations thereof are a mere repetition of trustees' and Phoenix' assertions in the original trial, as pointed out in Note 3 of this brief, page 16, *supra*. *10.

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*10. Petitioner on pages 54 and 55 of its brief, footnote 29, undertakes to dispute the findings of the court with reference to the control of the bridge company by John A. Thompson and his associates, officers of Phoenix, and in support of its assertions refers back to the first record. The same claims of percentage of stock ownership appear in its petition for re-hearing (F.R. 311), and the citations made for its present assertions are only to its petition for re-hearing and citations made therein to the minutes and stock ledger of the bridge company. Petitioner makes no reference to the evidence before the Master, and the court, showing the proxies procured and held in the names of persons under the control of said John A. Thompson and associates of Phoenix, nor to the evidence showing their control of other directors of the bridge company.

All the present assertions of Phoenix were before the court at the time of the ruling on petition for re-hearing and before the Circuit Court on appeal, and the decision of the trial court and of the appellate court thereon is res judicata of the fact that such control existed and such decision cannot be contravened and collaterally attacked as attempted by Phoenix. They are fully sustained by the record. The record fully sustains the findings.

John W. Shaffer and Vernon W. O'Connor were promoters of the bridge company and John A. Thompson acquired control through them about November 1, 1930. (F.R. 123.) John A. Thompson, with his wife, M. K. Thompson, and his associates, A. B. Wilder and Emory H. English, controlled Phoenix. M. White was John A. Thompson's secretary and an officer of Phoenix. (F.R. 675, 545, 684, 589.) Oscar R. Thorson was employed by Thompson in the work of the bridge company and elected a director at Thompson's suggestion. (F.R. 641, 642.) The only stock held by him was transferred from Thompson & Company. He paid nothing for them and later trans-

ferred them to Phoenix. (F.R. 595, 609.) He always acted with Thompson and never took issue with him. (F.R. 642, 667.)

There were outstanding 3750 shares of voting stock. (F.R. 1485-1489; 122-123.) Thompson was elected president on November 1, 1930. (F.R. 862.)

At the meetings on November 11 and November 26, 1930, 1500 shares were voted by Shaffer, as president of Standard Shares Holding Company, which was controlled by him, and 664 shares by V. M. O'Connor. John A. Thompson presided as president at each of these meetings and his wife acted as secretary. (F.R. 865-871.)

On November 26, 1930, Thompson & Company, a wholly-owned subsidiary of Phoenix (F.R. 545), John A. Thompson and A. B. Wilder held 1834 voting shares, more than one-half of the total voting stock authorized. 1800 shares of this had been issued to Shaffer & Company on that date and immediately transferred to Thompson & Company. (F.R. 596, 1305, 1335.)

At the annual meeting on March 10, 1931, Thompson & Company and John A. Thompson represented 1310 shares, and John A. Thompson held proxies for 375 shares, a total of 1685 shares out of a total number of 2586 shares represented at the meeting, and thus controlled it.

At the stockholders' meeting December 22, 1931, at which the bonds in question were voted, John A. Thompson by proxy and in person, Oscar R. Thorsen by proxy and in person, Mrs. John A. Thompson and M. White, John A. Thompson's secretary, voted 1709 shares, or more than half the stock represented in person and by proxy. (F.R. 591; 955-958.)

At the annual stockholders' meeting on March 8, 1932, out of 2917 votes cast at the election, John A. Thompson, Oscar R. Thorsen and one H. T. Wagner, as joint proxies, together with John A. Thompson and Wagner individually, cast 1781 votes out of a total of 2917 and controlled the election of the board of directors. (F.R. 986-989.)

At the stockholders' meeting held on July 8, 1933, at which there were present in person 964 shares, Thorsen and Thompson held proxies for 1283 shares, which were recognized. There were 1415 other proxies which, through Thompson's control of the meeting, were not recognized nor permitted to vote. On the final vote for directors there were 1878 cast, of which at least 1155 were controlled by Phoenix and Thorsen. (F.R. 1033.)

FIRST APPEAL.

The trustees and Phoenix Finance Corporation, compiainants, appealed from the opinion, findings of fact and final decree and from the court's ruling on motions to vacate the decree and the court's ruling on petition for rehearing to the Eighth Circuit Court of Appeals, asserting all the claims now attempted to be asserted by Phoenix Finance Corporation in the trial court on hearing of supplemental and ancillary bill and on this appeal. (Assignments of error, first appeal, trustees' assignments, F.R. 502-507; Phoenix Finance Corporation's assignments numbers 1 to 65, F.R. 508-528.)

The Circuit Court of Appeals in its opinion concluded that the record supported the lower court's findings with respect to lack of consideration for the $177,600.00 of bonds issued to Phoenix. (98 Fed. (2) 416, at 427; F.R. 1689-1709.)

Proceedings on Supplemental and Ancillary Bill After Issue Joined to Trial.

On January 23, 1940, Phoenix served notice to take the depositions of George E. Preuss, Edgar S. Gage and Lee J. Skoner (R. 174). The bridge company then filed a motion under rule 30-B, Rules of Civil Procedure, for an order that the depositions of the witnesses named be not taken upon grounds which appear in the record (R. 175-177). On February 2, 1940, Phoenix filed a resistance to the motions of the bridge company with certain schedules attached, setting out proposed testimony (R. 192-223).

As to the schedule entitled "George E. Preuss Testimony" (R. 217-218), it was asserted he would testify that he was an accountant and that he assisted Lee J.

Skoner to make a report for Phoenix and would testify to like effect as Skoner. His *ex parte* alleged work and report claimed to have been made are no part of the record in this cause. He was not present at the trial, nor at the hearing of exceptions, nor at the hearing of the petition for rehearing, and the proposed testimony was wholly incompetent, irrelevant and immaterial and the proposed witness incompetent to contravene the record.

There was also attached schedule entitled "Testimony of Edgar S. Gage" (R. 218). He was a witness on the original trial and subject to examination by Phoenix (F.R. 561). He made an affidavit for Phoenix, which was attached to its petition for rehearing, in which he made like statements to those contained in the schedule and on which he sought to show consideration for the bonds, which the Master and the court found did not exist (F.R. 271-276). Full reply to his affidavit was made in the bridge company and intervener's answer to petition for rehearing and affidavits thereto attached. (F.R. 394-398 and especially 397-398; 399-410, especially 408-410, inclusive.) The court had overruled the petition for rehearing and thereby found that his statements were not well founded. His proposed testimony was incompetent, irrelevant and immaterial, and he was an incompetent witness to contravene the record. (F.R. 411-413; Master's findings, F.R. 115-138; court's findings, F.R. 179-202.)

There was also attached a schedule entitled "testimony of Lee J. Skoner" (R. 221). He made an affidavit, which was attached to Phoenix Finance Corporation's petition for rehearing in this cause, wherein he made like statements as those contained in the schedule of proposed testimony, as to claimed consideration and underlying considerations for the bonds and with respect

to stock which the court found did not exist and were not supported by the record (F.R. 308-324; findings of fact, F.R. 179-202, and court's opinion, F.R. 156-179, especially 177), where the court states: "Touching this issue the Ernst & Ernst report is nothing short of *petitio principii,* the accountants in the report simply attempt to prove the truthfulness of the books and accounts by resorting to the books and accounts themselves." The proposed testimony was incompetent, irrelevant and immaterial and the witness was incompetent to contravene the record.

On February 6, 1940, the hearing on the motion was had and the court made its order that the depositions in question be not taken (R. 223-224). *11.

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*11. At the hearing the following proceedings took place:

"The Court: As I understand counsel and the resistance, including the tender, there is an offer to prove by these accountants, Chicago persons, matters bearing upon the issues that were presented and tried in the original trial of the case some years ago, and this upon the theory that the Phoenix Finance Corporation was not such a party to that case that it is bound by the decree entered therein and affirmed by the Court of Appeals. Is my assumption correct?

"Mr. Schenk: Not entirely. Our position is that the former decree did not preclude the Phoenix Finance Corporation in respect to the actions now sought to be joined, which have been brought in the State of Delaware.

"The Court: I may confine my statement to those items because really those are the only items in issue in this supplemental complaint.

"Mr. Schenk: May I add to my statement, 'Nor was there an adjudication cancelling the $50,000 mortgage referred to in the supplemental and ancillary bill'?

On February 10, 1940, Phoenix Finance Corporation filed notices for the taking of depositions of John A. Thompson and of Albert Penn (R. 224-226). The bridge company filed a motion for an order that these depositions be not taken and in the alternative that the scope of the examination be limited to specific matters considered competent, relevant and material by the court and that the court order whether such examination be written or oral interrogatories, and that the cause proceed to the hearing on permanent injunction on grounds stated in the record (R. 226-229).

"The Court: Yes, I think I understand counsel's contention.

"The ruling of the court will be that the only issues material to be considered in this supplemental complaint is the matter of the identity of the subjects presented for litigation in the Delaware suits described in the supplemental complaint with the items considered on the original trial, and which it was contended in that case by the plaintiff entered into and were refunded by the issue of bonds aggregating $200,000.00; that the identity of those items must be determined by the record in the original trial, and the court being of the opinion that the Phoenix Finance Corporation is in all respects bound by that decree because of its presence on the record in that case, and because of its succession to the previous corporation, all of whose acts and conduct were shown to have been ratified by the Phoenix Finance Corporation. The ruling herein must be in favor of the two motions.

"The motions will each be sustained, and an order granted finding and directing that the depositions in question will not be material; that the witnesses, whose testimony is noticed to be taken, are incompetent to contravene or overcome the record of the original trial." (R. 189-190.)

On February 29, 1940, Phoenix filed a resistance to this motion (R. 238-250). After hearing on March 5, 1940, an order was made by the court that the depositions of these witnesses be not taken (R. 256-257). *12, *13.

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*12. At the hearing on the motion, among others, the following proceedings occurred:

"The Court: But as in the consideration of the previous motion it is your contention that you are entitled to make the proof tendered because Phoenix was not bound by the final decree in the trial of the case originally?

"Mr. Schenk: It is our contention that Phoenix was not bound in respect to the matters which are now raised in suits started in Delaware, or in respect to the $50,000 mortgage referred to in the supplemental and ancillary bill. In other words we say that upon Mr. Ontjes' application as set forth in the supplemental and ancillary bill we are entitled to make the showing which we now tender, and the testimony and exhibits referred to in our resistance.

"The Court: That is all, gentlemen?

"Mr. Ontjes: That is all, Your Honor.

"The Court: The matter will be submitted." (R. 255.)

On the 5th day of March, 1940, the court entered formal order that the depositions of John A. Thompson and Albert Penn be not taken. The court stated:

"And the court having examined said motion and resistance and having heard statements of counsel from which it appears it is proposed to prove by said John A. Thompson and Albert Penn matters bearing upon the issues that were presented and tried in this cause some years ago;

"The only material issues to be considered in the supplemental complaint is the matter of the identity of the subjects presented for litigation in the Delaware courts, and the mortgage described in the supplemental complaint, with the items considered and determined in this cause, and the identity of these items must be determined from the records. That the depositions in question would not be material; that the witnesses whose testimony is noticed to be taken are incompetent to contravene or overcome the record in this case.

"It is, therefore, ordered that the depositions of John A. Thompson and Albert Penn shall not be taken." (R. 257.)

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*13. Said John A. Thompson and Albert Penn appeared at the trial and their proposed testimony is discussed infra.

Trial Supplemental Proceedings.

On March 11, 1940, trial was had on the supplemental and ancillary bill and answer thereto.

The Bridge Company's Evidence.

The respondent bridge company asked the court to take judicial notice of all the pleadings filed in the case, all depositions and evidence taken, the transcripts of such evidence, the Master's report, the exceptions filed to such report, the opinion, order and decree of the trial court made with respect to the exceptions to the Master's report, the final decree, the application or petition for rehearing filed by Phoenix and supplemental opinions and orders of the trial court with respect to that, and generally, without exception, all the records, papers and files in the cause. It also offered all these matters in evidence and asked that the court take judicial notice of the opinion of the Circuit Court of Appeals as reported in 98 Fed. (2) 416, and of the mandate of the Circuit Court of Appeals (R. 260).

Respondent also offered the following exhibits to show the identity of the matters involved in the Delaware actions with the matters involved in this cause:

Exhibit "SC-1," certified and exemplified copy of the summons and declaration in cause No. 39 described in paragraph 7-a of the supplemental and ancillary bill (R. 266; 294 to 301; 5 and 6).

Exhibit "SC-2," certified and exemplified copy of bill of complaint filed in the Chancery Court of Delaware, described in paragraph 7-b of the supplemental and ancillary bill (R. 267 and 301 to 307 and R. 6).

Exhibit "SC-3," certified and exemplified copy of the Delaware court of summons, affidavit of demand and writ, together with Narr. in cause No. 65, described in paragraph 7-c of the supplemental and ancillary bill as amended (R. 267; R. 307-319; R. 6-7; R. 98).

Exhibit "SC-4," certified and exemplified copy of Delaware suit, described in paragraph 7-d of the supplemental and ancillary bill as amended. (R. 267-268; R. 320 to 339; R. 7; R. 98-99.)

Exhibit "SC-5," certified and exemplified copy of Delaware court of summons, affidavit of demand and writ, Narr. declaration filed in cause No. 79, of the action described in paragraph 7-e of the supplemental and ancillary bill as amended (R. 268; 340 to 373; 7, 99).

Exhibits "SC-6" and "SC-7" to show the identity of the mortgage described in paragraph 11 of the supplemental and ancillary bill as amended and its recording in Allamakee County, Iowa, and its recording in Crawford County, Wisconsin (R. 268-269 and 374-385, 10).

And in support of the allegations of paragraph 9 of the ancillary bill (R. 8) respondent offered in evidence certain statements claimed by Phoenix to have been made by John A. Thompson at the meeting referred to in that paragraph contained in its resistance to the motion that depositions be not taken (R. 269-270, 201, 204). To prove the allegations of paragraph 10 of the bill (R. 9) respondent offered in evidence letter of John A. Thompson marked Exhibit "A," dated November 23, 1938, attached to resistance of Phoenix to the motion that depositions be not taken and Exhibit "B," letter of John A. Thompson, dated June 12, 1939, attached to the same resistance (R. 270-271, 214-217). Said letters containing the identical statements alleged in said paragraph.

Phoenix Finance Corporation's Evidence.

Petitioner Phoenix offered in evidence Exhibits "SC-101," "SC-102," "SC-103," "SC-104" and "SC-105," complete exemplified copies of the records and docket entries in the same proceedings referred to in the respondent's offers, "SC-1," "SC-2," "SC-3," "SC-4" and "SC-5" (R. 275).

Phoenix then proposed to call John A. Thompson as a witness (R. 276) with respect to the matters stated in the schedule entitled "testimony of John A. Thompson" attached to its resistance to the motion that depositions be not taken (R. 205-217).

John A. Thompson's deposition had been taken prior to the original trial, and he refused to answer numerous questions (F.R. 414-500). He was a witness on the part of Phoenix on the trial in this cause. (F.R. 538-561, 562-563, 633-637, 651-653, 673-685, 691-692.) He made affidavits for Phoenix, which are attached to its petition for rehearing (F.R. 230-231, 355-364). It was asserted that he would testify as to the Delaware suits described in the supplemental and ancillary bill as amended, with respect to which his testimony would have been wholly immaterial and incompetent. Certified, exemplified records thereof, which were offered in evidence by appellee were the best evidence thereof. It was asserted that he would testify with respect to alleged and pretended $50,000 mortgage and $97,000 of bonds and other items, all of which were found fraudulent and without consideration by the trial court and the Circuit Court of Appeals. (Findings of fact, F.R. 179-202; opinion of Circuit Court of Appeals, 98 Fed. (2) 416; F.R. 1689.) His proposed testimony was incompetent to contravene the record. It was asserted that he would testify with respect to copies of

letters written by him, dated November 23, 1938, and June 12, 1939, referred to in paragraph 10 of the supplemental and ancillary bill as Exhibits A and B thereto attached. Phoenix' answer substantially admits the allegations of said paragraph and the letters were offered in evidence by appellee on hearing on permanent injunction to prove the statements alleged in the supplemental and ancillary bill (R. 209, 9, 150-151).

It was asserted that he would testify with respect to the effect of the decree of the trial court and of the Circuit Court of Appeals relating to the action in Delaware involving alleged toll tickets, referred to in paragraph 7(f) of the supplemental and ancillary bill. His testimony was incompetent; the record was the best evidence; and furthermore, the court did not grant an injunction with respect to that action.

It was asserted that he would testify to matters in regard to the 517 shares of bridge company stock. All of the matters relating thereto were fully determined by the decisions of the trial court and of the Circuit Court of Appeals; and his testimony was incompetent to contravene the record.

It was asserted that he would deny that he made an assertion on or about the 6th day of December, 1938, as alleged in paragraph 9 of the supplemental and ancillary bill. That paragraph contains the statement that he asserted about the 6th day of December, 1938, that the litigation involved in this action was not ended, and would not be ended for a good many years (R. 8, 150). That was immaterial because appellee on the trial did not offer evidence of this particular statement, and because it was admitted in the answer of Phoenix that on the 8th day of

July, 1939, John A. Thompson did say that there were six cases pending in Delaware that would be carried on in the course of the next few months (R. 150).

And it is also in evidence from Phoenix' own resistance that he made the statements above quoted from the excerpt of transcript attached to the Penn schedule of Phoenix resistance, which are in substance what is alleged in the bill (R. 204).

It further offered to show Phoenix had complied with the order of April 24, 1934, for the production of books and papers, which the court in its ruling on petition for rehearing found that Phoenix did not produce; and to testify to the statements contained in his affidavits filed in connection with the petition for rehearing (R. 276-277). *14.

And to show what he claims he was told by Phoenix' counsel and to identify an alleged letter of Phoenix' counsel to the Special Master; and to testify as to claimed consideration for the $50,000 mortgage (R. 277-278), which was found fraudulent, wholly without consideration and void by the court (F.R. 191-192), and to have him identify certain checks (F.R. 278), one of $35,000 and one of

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*14. The books and records were never produced, and the court's finding and ruling on petition for re-hearing was fully sustained by the record and affidavits in resistance to said petition. (F.R. 613-616; 552; 675; folio 977; also see F.R. bottom 635, top 636; also see John A. Thompson deposition taken May, 1934, F.R. 414-500 and particularly 425-427; 434; 435, interrogatories 200-202; see affidavits; see answer to petition for re-hearing and affidavits attached thereto, F.R. 394-410, especially bottom 396 and top 397.) In the former appeal of Phoenix Finance Corporation the Phoenix assigned as alleged error the trial court's ruling on petition for re-hearing. (Assignments, 60-65; F.R. 527-528; appellant's former brief, 19, paragraph 35, and bottom 93 to 96; bridge company's brief, 123; this court affirmed the ruling.)

$15,000, with respect to which he testified on the former trial, which the court found were drawn by Phoenix, endorsed by the bridge company without consideration and returned to Phoenix, issued in connection with the making of false entries on the books of the bridge company (F.R. 551 552, 553, top 554; court's opinion, F.R. 173; court's findings petition for appeal, F R. 51; trustees' assignment of error 13, F.R. 505; Phoenix' assignments of error 11(b), F.R. 511, 31, F.R. 516; 43, F.R. 522; opinion Circuit Court of Appeals, F.R. 1689 at 1702, 1705, 1707) and to identify minutes of directors' meetings of the bridge company dated March 11, 1931, November 10, 1931, December 22, 1931, March 7, 1932; minutes of stockholders' meetings dated March 10, 1931, December 22, 1932 (R. 279), all of which were offered in evidence on the original trial, including minutes of stockholders' meeting of December 22, 1931, which through error in present record is referred to as December 22, 1932, on which latter date, the record shows, there was no meeting (F.R. 902 905; 939 945; 962 969; 979 986; 886 901; 946 959; 959 1027), and to identify Exhibit "SC 107," purported copy of letter dated March 15, 1932, from Iowa Wisconsin Bridge Company to Phoenix Finance System, signed by Oscar R. Thorson (R. 280 and 585 586), and to identify Exhibit "SC 108," purported copy of letter dated March 15, 1932, from Phoenix Finance System to the Iowa Wisconsin Bridge Company (R. 280 and 587 588), and to identify Exhibit "SC 109," purported copy of letter dated March 11, 1931, Iowa Wisconsin Bridge Company to Standard

Shares Holding Company, signed by Oscar R. Thorson (R. 299 and 300-303). *15.

And to show that in connection with the purported $70,000 mortgage dated March 10, 1931, an alleged further advancement by Phoenix Finance System, Inc., for the account of the bridge company in the sum of $9,000.00 under date December 10, 1931, was used to pay a lienor on the bridge company, Kramer & Hogg, and that the mortgage provided for subsequent advancements, and was security for that, and that the mortgage was for $59,000 instead of $70,000, as it reads upon the face thereof (R. 300-302). *16.

*15. Said purported letters of the bridge company purport to have been written in 1932 and 1931 while the bridge company was dominated and controlled by John A. Thompson, president of the Phoenix Finance Corporation, and its predecessor, and purport to be signed by Oscar R. Thorson, his employee. (Master's Report, F.R. 123, 163, 175.) It was not proposed to show any reason or explanation why the purported letters, if deemed material, by the Phoenix, were not offered in evidence on the original trial.

*16. The purported resolution passed at a directors' meeting on March 10, 1931, where only Thompson-controlled directors were present, only provided for a $50,000 mortgage. (F.R. 902-904; court's finding of fact No. 28, F.R. 191-192.) Phoenix in its exception number five to the Master's report, partially quoted above at page 44, asserted as consideration for $37,000 of bonds the purported mortgage of $50,000 with interest thereon, and as one of the separate and additional items of claimed consideration the above mentioned item. (F.R. Supp. 26-27.) And said Phoenix also asserted in said exception that said mortgage was an open one; that it covered future advances, quoting the same alleged provision as is quoted in appellant Phoenix Finance Corporation's present brief and argument at page 27. (F.R. Supp. 32.) The court found that the mortgage was wholly without consideration, fraudulent and void (F.R. 192), which was affirmed by the Circuit Court of Appeals. Phoenix' answer to the supplemental and ancillary bill contained no such allegation, not even the part thereof stricken by the court. (R. 147-167.)

And to show that Thompson, Phoenix Finance Corporation, Phoenix Finance System, Inc., Thompson & Company, and associates or affiliated companies did not control the bridge company or its board of directors. *17.

And to identify an alleged *ex parte* report of Ernst & Ernst under date of January 17, 1940 (R. 282). *18.

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*17. The Master found that they did control the bridge company and its board of directors. (F.R. 129.) To this finding Phoenix filed exceptions. (Phoenix' exceptions 1 and 2, F.R. Supp. 17-20.) The court overruled the exceptions and found that the bridge company was thus controlled. (F.R. 179-180; court's finding No. 20, F.R. 188, affirmed by this court.) See also note 10, p. 68, supra.

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*18. Phoenix attached a like ex parte report by Ernest & Ernest to its exceptions to the Master's report, made after the Master's report, of an alleged examination of the books of the bridge company and Standard Shares Holding Company, and certain other documents which were not in evidence. (F.R. Supp. 23.) This report, however, was not printed, but the preceding figures (F.R. Supp. 22-23) show a claim by Phoenix at that time that it had paid $112,379.03. With respect to this report, the trial court in its opinion, among other things, said:

> "This issue was clearly and sharply drawn whether the books and accounts of the bridge company, kept under the supervision of the Standard Shares Holding Company and Phoenix Finance Corporation, spoke the truth, or whether they were false and largely fictitious. Touching this issue, the Ernst & Ernst report is nothing short of a petitio principii. The accounts in the report simply attempt to prove the truthfulness of the books and accounts by resort to the books and accounts themselves." (F.R. 176-177.)

Phoenix in its petition for re-hearing by affidavit of Lee J. Skoner, employee of Ernst & Ernst referred to above, presented figures claimed to represent advances by Phoenix to the bridge company, Phoenix claiming by such affidavit advancements to the bridge company of $95,043.71. (F.R. 308-324.) The petition for re-hearing was overruled on the 4th day of March, 1937. (F.R. 411-413.) Phoenix assigned error upon the trial court's denial of the petition for rehearing. (F.R. 527-528.)

The Circuit Court of Appeals in its opinion on first appeal (F.R. 1689, at 1705) said:

And to show by him what is involved in the case referred to in paragraph 7(b) of the supplemental and ancillary bill and shown by certified exemplified Exhibit "SC-2" of the Delaware court with respect to the 517 shares of stock (R. 283). *19.

And to deny certain findings of the court on previous trial (R. 284-285) and to dispute the findings of the court with respect to items of $10,000 to Industrial Contracting Company and $11,262.71 to McClintic-Marshall, totaling $21,262.71, and the court's finding with respect to the succession of Phoenix Finance Corporation to Phoenix Finance System, Inc. (R. 285-286; court's findings numbers 32, 33 and 34, F.R. 194-196; and the court's findings numbers forty and forty-one, F.R. 201-202; affirmed by the Circuit Court of Appeals, 98 Fed. (2) 416, at 425; F.R. 1687, at 1702, 1690.)

The entire foregoing offer of testimony was objected to by respondent as being incompetent, irrelevant and immaterial, and that the witness proposed to be offered was not competent, contravening the record in this cause.

"It is argued with great earnestness by appellants that notwithstanding appearances the bridge cost $815,146.85, of which only $653,659.23 were paid for by outstanding stock, and that the difference of $161,487.62 was furnished by Phoenix; that the bridge company had no other source of income. This would be a formidable argument except for the fact that the bookkeeping by which the result is reached is set out and it does not bear analysis. The figures are confuted by the facts."

In their answer to the supplemental and ancillary bill of complaint, now three years later Phoenix proposed to present still another alleged ex parte report, setting up a retabulation of the same claims.

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*19. The exhibit was the best evidence and his proposed testimony on the subject would have been wholly incompetent and secondary.

The objection was sustained, and the offer of proof denied (R. 286-287).

Phoenix offered in evidence its Exhibit "SC-106," purported letter from its counsel, Rex Fowler, to Mr. J. W. Kindig, dated July 25, 1935. Respondent objected to it as being incompetent, irrelevant and immaterial, not part of the record in this case and that it could not be added then as part of the record (R. 287). The objection was sustained.

Petitioner offered in evidence the minutes of the directors' meetings of the bridge company of March 11, 1931, November 10, 1931, December 22, 1931, and March 7, 1932, and minutes of stockholders' meetings of March 10, 1931, December 22, 1932, to which respondent objected as immaterial, as new offers made, and that the minutes were already in the record before the court. The court sustained the objection (R. 287).

Petitioner offered in evidence its Exhibit "SC-107," purported letter from Iowa-Wisconsin Bridge Company to Phoenix Finance System, Inc., dated March 15, 1932, to which respondent objected as incompetent, irrelevant and immaterial, attempted offer of new evidence, which was no part of the record on the former trial of this case. The court sustained the objection (R. 287).

Petitioner offered its Exhibit "SC-108," purported letter of Phoenix Finance System, Inc., to the bridge company, to which respondent objected as incompetent, irrelevant and immaterial, no bearing on the issues there tendered and not a part of the record in the cause. The objection was sustained by the court (R. 287-288).

Petitioner offered in evidence its Exhibit "SC-109," purported letter of bridge company to Standard Shares Holding Company, dated March 11, 1931, to which respondent objected as incompetent, irrelevant and immaterial, no part of the record in this cause, and could not stand as new and independent evidence outside the record. The objection was sustained by the court (R. 288).

Petitioner offered in evidence its Exhibit "SC-110," purported transcript of stockholders' meeting of July 8, 1939, and its Exhibit "SC-111," purported transcript of stockholders' meeting of December 6, 1938, to which respondent objected; and the objections were sustained and petitioner did not include the proposed exhibits in its designation of the record (R. 288-289).

Petitioner offered in evidence its Exhibit "SC-112," purported photostat copy of check dated 3-11-31, Phoenix Finance System, Inc., to Iowa-Wisconsin Bridge Company, and its Exhibit "SC-113," purported photostat copy of check dated 3-11-31, Phoenix to bridge company, to which respondent objected as incompetent, irrelevant and immaterial, repetition of the record previously made. The court sustained the objection (R. 289-290).

Petitioner offered to show by Albert Penn as a witness (R. 291) the matters mentioned in the schedule entitled "Albert Penn Testimony," attached to the resistance to the motion that depositions be not taken (R. 197-205). Albert Penn was not present at the original trial of this cause, nor at the hearing on exceptions to the Master's report, nor at the hearing of petition for rehearing, but he made an affidavit for Phoenix in support of said petition, in which he asserted substantially the same things as were asserted in the schedule (F.R. 302-304).

In the schedule it was asserted that he would testify that the bridge company is indebted to Phoenix and with respect to items which were involved in previous trial, including the pretended mortgage, all of which were determined to be fraudulent and without consideration in the prior decisions of the trial court and of the Circuit Court of Appeals (findings of fact F.R. 172-202; opinion of the Circuit Court of Appeals, 98 Fed (2) 416; F.R. 1689). All of such proposed testimony was in contravention of the record. No statement of diligence was made as to why this proposed witness, who was a director of Phoenix, was not called as a witness in the original trial if he claimed to know anything. And it was asserted in the schedule that the witness would testify to the correctness of the excerpt of the shorthand report of stockholders' meeting held on July 8, 1939, attached to the schedule; but that was immaterial because paragraph 9 of the supplemental and ancillary bill (R. 8) alleges that on July 8, 1939, as president of Phoenix, said Thompson further asserted that one case had been tried in the courts of Delaware in June, 1939; that the things, referring to the matters involved in this case, were not over, and that there were six cases in the State of Delaware that would be carried on in the courts in the next few months (R. 8). The Phoenix' answer admits that on July 8, 1939, John A. Thompson did say that there were six cases pending in the State of Delaware that would be carried on in the course of the next few months; and the excerpt contains the statement: "Mr. Ontjes has stated here and he stated in the December meeting that the litigation between the Phoenix and the bridge company was all over. Now, in the first place, there never was any litigation between the Phoenix and the bridge company" (R. 201). And the statement—"Now this indebtedness can be properly pre-

sented and evidence can be put down in the Delaware court. This is now being done. There are six cases down there now that will be carried on through the courts in the next few months, the one that I have just described was heard—it is all finished except the decision of the court, which they promised by the first of August and the five others to follow" (R. 204).

That is in substance what the supplemental and ancillary bill alleges, and the other statements contained in the excerpt are the mere self-serving declarations of Mr. Thompson of Phoenix. The above quoted statements were offered in evidence at the hearing on permanent injunction by respondent, bridge company (R. 269-270).

The respondent objected to the foregoing offer of testimony as being incompetent, irrelevant and immaterial and the witness incompetent to contravene the record. The objection was sustained by the court (R. 291).

Petitioner offered to call Emory H. English as a witness to testify with respect to compliance by Phoenix Finance Corporation with the order of the court to produce books and records pertaining to its business with the Iowa-Wisconsin Bridge Company, to which respondent objected as follows (R. 221-223): "Objected to as being incompetent, irrelevant and immaterial and Mr. English is not competent to contravene the record of the previous trial of this cause; his testimony is in the record; he was examined and cross examined and any statement by him would be a mere attempt to vary the record" (R. 613-616). The Court: "The objection will be sustained and the offer will be denied" (R. 291).

The petition offered to call Lee J. Skoner as a witness (R. 291) to testify to the matters stated in the sched-

ule entiled "Testimony of Lee J. Skoner," attached to the resistance of Phoenix, and to identify purported report of Ernst & Ernst of an examination of the affairs of the Iowa-Wisconsin Bridge Company under date of January 17, 1940, which was marked appellant's Exhibit "SC-114" and in connection with such offer petitioner offered said exhibit, to which respondent objected: "We object to the offer of the testimony of Mr. Skoner as being incompetent, irrelevant and immaterial. Mr. Skoner is not competent to vary or contradict the record in this cause, or to contravene it in any way. Furthermore, Mr. Skoner or the Phoenix Finance Corporation in the petition for rehearing presented an affidavit claiming to be the same Mr. Skoner with respect to some of these matters and passed upon by the court." The Court: "The objection sustained and the offer is denied in its entirety" (R. 292, see p. 72, *supra;* see also note 18, *supra*).

The cause was submitted (R. 293).

The court made findings of fact and conclusions of law, which were filed March 23, 1940 (R. 700-717).

Findings of Fact and Conclusions of Law of the District Court.

Finding Number One (R. 701-704):

The record sustaining the court's finding number one is set forth in the statement of the case, this brief, pages 25 to 58.

Findings Numbers Two and Two-A (R. 704):

The court's findings numbers two and two-A are sustained by the record, pages 1 and 2; 101-141; 237.

Finding Number Three (R. 705):

The facts sustaining finding number three are set forth in the statement of the case, pages 25 to 58.

Finding Number Four (R. 705):

Admitted in the answer. See bill, par. 2, R. 3; answer, par. 2, (R. 147):

Finding Number Five (R. 705):

Admitted in substance in the answer. See bill, par. 3. p. 4, R. 4; answer, par. 3, 147-148; and also in support see F.R. 206-223; 224-391).

Finding Number Six (R. 705):

Admitted in the answer. See bill, par. 4, p. 4; answer, par. 4, p. 148.

Finding Number Seven (R. 706):

See ancillary bill, par. 5, R. 4; defendant's answer, par. 5, R. 148, "admits all allegations concerning date of commencement, depositions, transcripts, exhibits, and trial before Master except the length thereof, which appear in paragraph 5 prior to the allegation concerning work on exceptions settling record and appeal, and as to this allegation Phoenix states that it is without knowledge or information sufficient to form a belief as to the truth thereof. For answering, denies each and every allegation of paragraph 5 not herein expressly admitted." The finding is amply sustained by the judicial knowledge of the trial court as shown by the voluminous record in this case.

Finding Number Eight (R. 706):

"That notwithstanding the final adjudication and order of the District Court of the United States for the Northern District of Iowa, the complainant, Phoenix Finance Corporation is disregarding said adjudication and order, and for the purpose of attempting to invalidate and nullify the lawful decree and order of this court and for the purpose of depriving the defendant of the fruits of said adjudication and for the purpose of harassing, vexing and annoying and destroying the business of the defendant, has commenced and is prosecuting and is about to prosecute in the State of Delaware numerous and divers suits and actions involving the same matters fully and finally determined by this court, and has further and in contempt of this court filed for record and recorded the $50,000 mortgage hereinbefore and hereinafter referred to held by this court to be fraudulent and invalid."

This finding is amply sustained by the court's judicial knowledge of the prior record and by the facts produced in this record with respect to the Delaware actions and the recording of said $50,000 mortgage, as set forth in the above statement of the case (pages 3 to 88) *supra*.

Finding Number Nine:

Finding 9-A $2,000 and $3,125 Notes.

"a. Said Phoenix Finance Corporation filed an action entitled Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware, versus the Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware in the Superior Court of the State of Delaware in and for New Castle County, being

case No. 39, November Term, 1936, the summons of said action being dated September 29, 1938, and the alleged cause of action being based on two certain alleged promissory notes, one of $2,000 dated December 15, 1932, and one of $3,125 dated January 20, 1933, which were involved in the above entitled cause and the adjudication thereof; that in this cause it was claimed that said notes and the alleged considerations thereof formed part of the consideration for the issuance of $20,100 of the bonds involved in this action. That this court found that the said bonds were fraudulently issued and wholly without consideration and were more than offset by indebtedness of Phoenix Finance Corporation and its predecessor Phoenix Finance System, Inc., to this defendant, Iowa-Wisconsin Bridge Company. That in said cause in Delaware the defendant, Iowa-Wisconsin Bridge Company interposed the defense of *res judicata* and other defenses, such as want of consideration. That said cause was tried on the issue raised by the plea of *res judicata*, but has not yet been determined by the Delaware court" (R., p. 707).

See paragraph 7(a) of the supplemental and ancillary bill (R., pp. 5-6), and Phoenix answer, par. 7(a), (R., p. 148) which "admits that it filed the action described in paragraph 7(a), based on two promissory notes, one of $2,000 and one of $3,125; admits that this court set forth in its decree that the mortgage and bonds sought to be foreclosed were fraudulently issued and that the bonds were without valid consideration, with the exception of certain bonds aggregating $15,000," etc.

The suit referred to in this finding involves one note for $2,000 and one note for $3,125 (R., pp. 5-6; Ex. SC-1, R., pp. 294-301), which were part of an alleged indebtedness of $17,735.19 to Phoenix Finance Corporation se-

cured by $20,100 of bonds involved in this case. On the 17th day of July, 1933, the Thompson-Phoenix controlled board of the bridge company passed a resolution that $20,100 of Class B bonds of the bridge company be pledged as collateral to a note of $12,110.19 to Phoenix and three other notes in the amount of $5,625 to Phoenix (the latter notes being one of $500; one of $3,125 and one of $2,000). (F.R., pp. 1027-1029, Ex. No. 28 HEB shows issuance of collateral of said bonds to said notes (F.R., p. 829; pp. 562 and 563). The $200,000 of bonds involved in the action in this court were $100,000 Class A bonds and $100,000 Class B bonds. The $12,110.19 note and the $500 note are involved in another Delaware suit, hereinafter referred to in paragraph (c).

The master found as to the specific grounds which were collateral for the notes above mentioned involved in the Delaware suits (Finding 10):

"(i) That the remaining bonds, approximating $19,000 to $20,000 were issued to the Phoenix Finance Corporation as security for a note of $3,125.00 given in part to secure the payment of that amount made by the said Phoenix Corporation on behalf of the bridge company to pay taxes of the bridge company in the state of Wisconsin. That to the extent of the principal of, and interest on, the said note only the said bonds are valid, but to no other extent are these particular bonds valid."

"(k) That of the bonds above named issued to Phoenix Finance Corporation to secure the said note of $3,125.00 the amount of bonds not necessary for such security, approximating the sum of $16,975 are without consideration, obtained by a fraud and invalid" (F.R., p. 133 to p. 134).

The master in his conclusions of law stated:

"Paragraph 5. That under the facts above found, it is apparent as a matter of law that the complainants did not furnish the necessary proof in sustaining the validity of the bonds, except the bonds specifically named in paragraph 10 of the findings of fact, and the Phoenix Finance showing made in the first instance by the complainants has been overcome by evidence of the defendant and interveners excepting as to those bonds especially named as having consideration in paragraph 10 of the findings of fact, and all the said bonds not named in said paragraph 10 of the findings of fact as having a consideration, are illegal and void because they were issued fraudulently."

"Paragraph 6. That excluding the said bonds specifically mentioned in paragraph 10 of the findings of fact as having consideration, approximately $112,375 of the balance of said bonds issued to the said Thompson and his companies, not in exchange for stock but on a fraudulently alleged consideration purporting to appear on the books of the Iowa-Wisconsin Bridge Company were issued without legal consideration and are therefore void" (F.R., p. 136).

The interveners and defendant filed exceptions to the master's report (F.R., p. 148), exception 8 being:

"To so much of the fifth conclusion of law as makes the following exception to such conclusion, to-wit: 'except the bonds specifically named in paragraph 10 of the findings of fact' and to the seventh conclusion of law insofar as it makes exception to such conclusion and to so much of the eleventh conclusion of law as makes exception in said paragraph to said conclusions as follows, to-wit: 'Exception as hereinbefore stated' and 'exception that the

bonds named in paragraph 10 in the findings of fact as having been issued in good faith are valid and may be enforced accordingly' " (F.R., p. 153 to and inc. p. 155 and 224 to 226).

Exception No. 8 and intervener's exceptions 9 and 11 were sustained by the court in its final decree (F.R., p. 203).

The complainants filed exception (F.R., Supp., pp. 10 and 11).

Complainant, Phoenix Finance Corporation, filed full and complete exceptions to the master's report redefining with particularity the issues involved (F.R., Supp., p. 14 to and including p. 58), and with particularity excepted with respect to the notes now in issue as follows, beginning on page 48 of the supplemental transcript of record:

"Exception No. 6. It excepts to fact finding 10 (i) and (k), wherein the master refers to bonds of '$19,000 to $20,000' and finds them to be a valid pledge for principal and interest on a note of $3,125.00 from the bridge company to the Phoenix Finance Corporation, but invalid to the extent of $16,975 as without consideration and fraudulent.

"This finding is erroneous for the following reasons:"

Then follows the statement appearing at pages 46 to 47, inclusive, of this brief, *supra*.

It will be noted that in the foregoing exception Phoenix not only asserts the notes as claimed consideration for the bonds, but asserts claimed original underlying considerations of said notes as consideration for the issuance of the bonds. As showing that the notes described

in paragraphs (a) and (c) of said exception quoted above are the same as those involved in the Delaware action described in the above finding of the court 9(a), see Exhibit 8C-1, R., pp. 294-301, particularly R., pp. 298-299. As showing that the notes described in paragraphs (b) and (d) of said exception above quoted are the same as those involved in the Delaware action described in the court's finding number 9(c) hereinafter refered to, see Exhibit 8C-3, R., pp. 307-319.

The statements of petitioner on page 27 of its brief "That there was no finding of fact by the master with respect to the $2,000 note" and "The district court made no reference to the $2,000 note in its finding and opinion" are not supported by the record.

And the statement of petitioner on page 31 of its brief "There is no finding or conclusion either of the master or of the district court in the foreclosure case which is specifically and directly referable to the two notes for $12,110.19 and $500, respectively, for which Phoenix is suing the bridge company in Delaware in this action" is without foundation or merit. We call attention to this at this time because what is said above and what is said following also applies to the court's finding number 9(c) dealing with the last mentioned notes and action hereinafter further referred to.

The said Phoenix exception continues:

2.

"The master makes no reference to note herein designated (a) *for $2,000.00, but disallows it without stated reason or reference, as being without consideration and fraudulent. The master clearly erred because this was a plain loan of cash by Phoenix Finance Cor-*

poration to the bridge company and the money was deposited in the bridge company account in the Iowa-Des Moines National Bank & Trust Company.) (Emphasis supplied.) (See Exhibit 30 H. L. Bump, bridge company pass book at bank; Exhibit 54 H. L. Bump, bridge company deposit tickets; Exhibit 37 H. L. Bump, bank statement; Exhibit 1, bridge company journal, page 197, line 16; and Exhibit 2, bridge company ledger, Notes Payable Account.)

3.

"*The master makes no reference to notes herein designated (b) and (d)* (the $500 note and the $12,110.19 note referred to in Finding 7-c *infra*) *but without stated reason or reference disallows them both as without consideration and fraudulent. These notes grow out of the same source and are analyzed together.* (Emphasis supplied.) From late 1931 to the middle of 1933, being a period long after the bridge was built, the bridge company was in dire need of money. Phoenix Finance Corporation loaned the bridge company cash both by direct transfer of money which was deposited by the bridge company in its bank account and also by Phoenix Finance Corporation paying debts and liabilities of the bridge company.

4.

"The master correctly allowed note (c) for $3,125.00 which was cash loaned to the bridge company and by it deposited in the bank and used to pay taxes in Wisconsin, but incorrectly found that this collateral pledge of bonds was valid only to the amount of the principal and interest of said note. He should have held the entire

pledge of bonds valid until the obligation secured thereby was paid in full.

5.

"The indebtedness for which these four notes was given could not be held fraudulent on this record and the master erred in so finding. It was incurred long after the bridge was built and under full knowledge and authorization of the bridge company directory board composed of directors who were concededly not 'Thompson men or associates.'

6

"The debt evidenced by these four notes was incurred by a directory board against which there is not a breath of suspicion. It represents cash—borrowed by the bridge company—in a time of need—when it couldn't borrow elsewhere. The four notes ought to be allowed in full, with interest thereon, and this $20,100 pledge of bonds should be held valid until the debt secured is fully paid."

The court, after hearing the various exceptions, rendered its opinion, its findings of fact and final decree (F.R., pp. 156-204). The court in its opinion said:

"Phoenix Corporation's exception No. 6 challenges the master's finding of fact No. 10" (F.R., pp. 164-165).

"Defendant and interveners' exception No. 8. This exception challenges so much of the master's fifth conclusion of law as makes the following exception to such conclusion: 'Except the bonds specifically named in paragraph 10 of the findings of fact;' and to so much of

the master's eleventh conclusion of law as makes exception to such conclusion, because the record does not warrant the exceptions" (F.R., pp. 165-166).

With reference to these exceptions the court said:

"This conclusion of law is attacked in the defendant and interveners' eighth exception. I think that insofar as the language of the master's conclusion includes $9,000 of bonds held valid in the hands of the Phoenix Finance Corporation, and the $3,125.00 in bonds held valid in the hands of the Phoenix Finance Corporation, it is erroneous. What I have said with respect to the legal status of the Phoenix Finance Corporation as the successors of Phoenix Finance System, Inc., places it completely upon the level with its predecessor so far as equities are concerned. With full notice it has adopted everything its predecessor did, and with full notice that its predecessor had at the outset taken 140 shares of stock of the bridge company without paying any subscription price therefor and has not accounted for it" (F.R., pp. 177-178).

"In view of the conclusion of the court, a decree should be entered overruling the exception of plaintiff trustees, numbered one to eight, inclusive, and of Phoenix Finance Corporation, numbered one to six inclusive, and exceptions reserved to the respective plaintiffs * * * and sustain defendant and interveners' exceptions numbered eight, nine and eleven with exceptions reserved to the plaintiffs" (F.R., p. 178).

The findings of fact of the court appear on pages 179 to 202 inclusive of the first record.

The court first takes up the findings of the master, and approves only those portions of findings 10 (i) and (k) which find that bonds approximating $19,000 or

$20,000 were without consideration, obtained by fraud and invalid. The court disapproved the finding of the master that $3,125.00 of the bonds had consideration and were valid (F.R., p. 179).

In addition to approving the findings of the master, the court made a number of additional findings, the most pertinent of which are the following:

"8. That Phoenix Finance Corporation, complainant and defendant to petition of intervention, is the successor in interest of Phoenix Finance System, Inc., and subject to all defenses and offsets to which said Phoenix Finance System, Inc., was at any time subject (F.R., p. 185).

"9. That this action was instituted by the plaintiffs herein as trustees upon the demand of Phoenix Finance Corporation, as owners and holders of $177,600 of the $200,000 of the bonds involved herein.

"That said Phoenix Finance Corporation referred to, agreed to secure and indemnify said trustees against all costs, expenses and liabilities incurred by them in taking the action demanded; and also designated the attorneys to be employed by the trustees, and agreed to save the trustees harmless on account of any claim by said attorneys for fees and expenses in connection with the litigation" (F.R., pp. 185-186).

By its findings Nos. 28, 29, 30, 41, the court determined that as a result of certain fraudulent transactions Phoenix Finance System, Inc., had become indebted to the bridge company in an amount of $26,085.85, and that Phoenix Finance Corporation took over as the successor in interest of Phoenix Finance System, Inc., with full knowledge of the facts and was subject to all liabili-

ties inherent in the position of Phoenix Finance System, Inc. (F.R., pp. 192-194, 202).

The court in its decree specifically overruled the exceptions of plaintiff trustees numbered 1 to 8, inclusive, and of Phoenix Finance Corporation numbered 1 to 6, inclusive, and sustained defendants' and interveners' exceptions numbers 8, 9 and 11 and decreed "that the mortgage and bonds in suit were fraudulently issued; that all bonds are without consideration, with the exception of bonds aggregating $15,000 hereinafter specified. That the bill of the plaintiffs be dismissed as to the plaintiff Phoenix Finance Corporation, and that the prayer of the bill be denied, except insofar as the decree provides for the protection of the holders of said $15,000 of bonds" (F.R., p. 204).

Said $15,000 of bonds were held by persons other than the Phoenix Finance Corporation (F.R., pp. 203-204).

Phoenix Finance Corporation filed a petition for rehearing and modification of decree, again claiming that the notes above mentioned furnished a consideration for said $20,100 of bonds (F.R., pp. 216-223). Paragraph 12 of the petition (F.R., pp. 219-220) refers to a number of affidavits attached to the petition and states: "The ultimate facts which can and will be proved on this point are that the bridge company knowingly procured large amounts of cash and full and fair consideration for the bonds now held by the Phoenix Coorporation."

The petition for rehearing refers to an affidavit of M. K. Thompson, in which the aforesaid notes and the claimed underlying considerations thereof are again set forth as claimed consideration for the bonds (F.R., pp. 325-326). And the petition refers to affidavits by L. J.

Skoner and W. S. Gault (Gault—F.R., p. 278; Skoner—F.R., pp. 308-310; 315-319, 323) in which both assert the notes in question and the claimed underlying considerations thereof as consideration for the bonds.

The petition for rehearing, among other things, prayed in the alternative:

"In case a rehearing is denied that the decree be modified so as to withhold from adjudication the right of petitioner to institute an action at law against the bridge company, if it so desires, for money had and received" (F.R., p. 223). Answer was filed thereto by defendant and interveners (F.R., pp. 394-410). A resistance was filed to the petition for rehearing and modification of decree (F.R., pp. 392-394).

The court overruled the petition for rehearing and for modification of decree (F.R., pp. 411-413).

An appeal was taken to the Circuit Court of Appeals by the trustees and Phoenix Finance Corporation, in which the plaintiffs-appellants again urged their claim that the aforesaid four notes furnished consideration for said bonds, and asserted that the $20,100 of bonds were collateral for loans and advances, by their assignments of errors (trustees' assignments 9, 12, 14 and 19, F.R., pp. 504, 506; Phoenix assignments 14, 15, 55, F.R., pp. 511-12, 526).

The Circuit Court of Appeals found that the $20,100 of bonds were issued to Phoenix as collateral to secure a purported indebtedness of $17,735.19; that the master had allowed $3,125, which was a just claim but was more than offset by the $14,000 and other items referred to in the opinion; that $9,806.10 of the amount were furnished by Phoenix to pay interest on bonds held by Phoenix, which

were known by the officers of Phoenix to be fraudulent; that $1,505.75 was charged for salaries to Phoenix officers and employees, in defense of which the court found no argument; and the remainder of the claim was for cash items alleged to have been advanced by Phoenix to the bridge company, which if allowable, were wiped out by the indebtedness of Phoenix to the bridge company (F.R. 1704).

Neither the master nor the court nor any of counsel (specially see F.R., Supp., p. 49, paragraphs 2 and 3 quoted *supra*) except present counsel, who labors under the handicap of being the fourth chief counsel for Phoenix in the case, had any difficulty in comprehending that the four notes, $2,000.00, $3,125.00, $500.00 and $12,110.19, respectively, and the purported indebtedness which they represented were specifically passed upon. The notes were referred to in the minutes of Thompson-Phoenix-controlled directors, purporting to authorize the issuance of the $20,100 of bonds (F.R., pp. 1028-1029), the $2,000 note was referred to in the minutes in the figure $5,-625.00, which it clearly appears from exception number 6 consisted of the $2,000 note, the $500 note and the $3,125.00 note. In the testimony of the witness, John A. Thompson (F.R., p. 563) he states: "However, the memorandum shows that the $20,000 face value of B bonds were in the possession of Phoenix, having been deposited as collateral by the bridge company to notes issued by the bridge company for borrowed money in the total sum of $17,735.19." The four notes making up this amount are shown on the notes payable account of the bridge company ledger entitled "Phoenix Finance System, Inc." (F.R., p. 1103), which is referred to in Phoenix' exception number 6 quoted *supra*, and the $2,000 note dated Decem-

ber 15, 1932, the $500 note dated December 31, 1932, the $3,125.00 note dated January 20, 1933, the $12,110.19 note dated July 7, 1933, were specifically set out in the affidavit of Mrs. M. K. Thompson, wife of John A. Thompson (F.R., pp. 325-326), and the claimed underlying indebtedness checks for $2,000 and $3,125 at page 325, while a purported copy of the checks is attached to affidavit of Lee J. Skoner (F.R., pp. 315 and 319).

Moreover, the exact relationship of the $2,000 note, the $500 note, the $3,125 note and the $12,110.19 note; the $17,735.19 total and the $20,100 of bonds, is shown on the statement, Exhibit B-28, H. E. B. (F.R., p. 829), which was before the master (F.R., p. 562).

There can be no question from a reading of the record as to the inclusion of the $2,000 note, the $3,125 note, the $500 note and the $12,110.19 note and the indebtedness they purported to represent in the findings of the master, the trial court and of the Circuit Court of Appeals.

The suit in the court of Delaware on the two notes, one of $2,000 and one of $3,125, is simply an attempt to relitigate matters determined by the federal courts in this case. Those notes and the claimed indebtedness which they purported to represent, were directly put forward as the considerations for bonds involved in this case, and the federal courts have found and decreed that they did not constitute a consideration. The fact that the defendant has appeared in the Delaware court and pleaded *res adjudicata* and that the case is now pending there does not affect the right to an injunction restraining the plaintiff from further prosecuting the action.

The Phoenix' erroneous assertions have made it necessary to unduly lengthen this brief by quotations from the record.

Finding 9-B—The 517 Shares of Stock.

"b. That on or about the 20th day of February, 1939, the said Phoenix Finance Corporation commenced an action in the Court of Chancery of the State of Delaware in and for New Castle County, entitled, Phoenix Finance Corporation, a corporation of the State of Delaware, plaintiff, versus Iowa-Wisconsin Bridge Company, a corporation of the State of Delaware, defendant, and caused subpoena to be issued therein and served on said defendant and filed bill of complaint on February 18, 1939, asking to recover 517 shares of Class 'A' stock of the Iowa-Wisconsin Bridge Company, which was surrendered and cancelled at the time the said Phoenix Finance Corporation fraudulently procured the issuance of $60,500 of bonds involved in and as found in this action, and which stock this court and the Circuit Court of Appeals ordered, adjudged and found the said Phoenix Finance Corporation was not entitled to have reissued to it. That the defendant has answered in said cause, but that said cause has not been tried" (R., pp. 707-708).

See paragraph 7(b) of the supplemental and ancillary bill (R., p. 6) and Phoenix answer, paragraph 7(b) (R., p. 149), which admits that it commenced the action described in paragraph 7(b), seeking delivery to Phoenix of a new certificate for 517 shares of Class "A" stock; and admits that the certificate for these shares was delivered by Phoenix to the bridge company in connection with the $60,500 of bonds of the bridge company.

The suit referred to in this finding is an action filed in the Chancery Court of Delaware for the recovery of 517 shares of preferred stock of the bridge company (R., p. 6; Exhibit SC-2, R., pp. 301-307), to which the district court and the Circuit Court of Appeals decided that Phoenix was not entitled to. Phoenix caused this stock

to be cancelled when fraudulently obtaining bonds of the bridge company. John A. Thompson and his associates, controlling Phoenix Finance System, Inc., and dominating and controlling the bridge company, caused, as a part of a scheme, plan and conspiracy, a $200,000.00 bond issue and mortgage deed of trust to be issued to defraud the bridge company and its stockholders out of their property, and in connection therewith cancelled said 517 shares of stock while fraudulently obtaining $60,500 of bridge company bonds. (Opinion of Trial Court, F.R., pp. 156 to 179 and especially page 175; Findings of Fact, pages 179 to 202, and especially Findings 35, 36, 37, 38, 39; page 180; pages 196-202.)

It was alleged that the stock was fraudulently exchanged for bonds as a part of a fraudulent conspiracy and with this charge both the trustees and Phoenix took issue, and that placed directly before the court in making full disposition of the controversy, the question whether property used in a conspiracy as an instrumentality in the perpetration of a fraud may be recovered, and whether the stock should be returned to Phoenix if the transaction was found fraudulent.

The petition of intervention as amended alleged that the articles of the bridge company provided "• • • If less than all shares of Class 'A' (preferred) stock are to be redeemed, the shares to be redeemed shall be selected by lot or *pro rata* as the board of directors shall determine. Notice of the intention of the corporation to redeem shares of Class 'A' stock shall be mailed at least thirty days before the date of redemption to each stockholder of record of the shares to be redeemed • • •" (F.R., p. 76). "• • • Any Class 'A' stock purchased for redemption under any provision hereof, or otherwise,

shall be cancelled and not reissued. * * * As long as any of the Class 'A' stock shall be outstanding, the corporation shall not (except for the purpose of redeeming all of the Class 'A' stock) unless with the affirmative vote or written consent of the holders of at least two-thirds in amount of the Class 'A' stock then outstanding: (a) * * * (b) increase the authorized amount of the Class 'A' stock, or create any stock (or security convertible into stock), having any preference or priority over or equality with Class 'A' stock" (F.R., p. 77).

And par. 13 (F.R., pp. 80-81; amendment (F.R., p. 101) alleged in substance that John A. Thompson and others of Phoenix Finance System, Inc., acting in concert and as parties of a common scheme, plan and conspiracy to cheat and defraud the defendant corporation and its stockholders, and with intent to cheat and defraud said defendant corporation and its stockholders while controlling the board of directors of the defendant corporation, so manipulated the affairs of said company as to issue and deliver to Phoenix Finance System, Inc., $60,500 of bonds in exchange for 517 shares of its preferred stock. That in such transaction the parties of said plan and scheme, owning and controlling Phoenix Finance System, Inc., and controlling the defendant corporation, acted for the defendant corporation in a matter in which the interests of said corporation were adverse. That at the time of said transaction the defendant did not have any surplus with which to repurchase any of its stock, and that such pretended repurchase of stock was in violation of the statutes of Delaware and the issuance of such bonds a violation of its charter provisions, and that the transaction was *ultra vires* and void, and caused an impairment of the capital of the bridge company. * * * I and

(par. 16, F.R., pp. 80-81) alleged "that all the acts and proceedings of said Thompson and associates and said Phoenix Finance System, Inc., were in (furtherance) of a scheme and conspiracy to defraud the stockholders of defendant of their rights and equity of redemption in defendant's property * * *." *20.

Phoenix in its answer denied the allegations of the petition of intervention and placed them in issue and prayed for general equitable relief (F.R., pp. 91, 92). The trustees filed a reply denying the allegations of the petition of intervention (F.R., pp. 102, 103). The order of reference directed the master to report "whether the evidence and the pleadings entitled complainants or the other parties herein to the relief, or any part thereof, prayed in their respective pleadings" (F.R., p. 108).

The master found that at the time of the exchange and surrender of stock for bonds, there was an impairment of the capital of the bridge company in violation of the Delaware statutes, and that there were outstanding other shares of preferred stock of the bridge company, the holders of which were not given notice or opportunity to surrender it as required by the articles of incorporation of the company, and that all stock of like kinds was not redeemed at that time, nor a portion thereof called by lot after notice so as to provide fairness and equity between all stockholders, and that it was done for the sole advantage of Thompson and his controlled companies (Phoenix) and to the disadvantage of other like stock-

*20. Transactions in which common directors and officers of two corporations act, in which the interests of such corporations are adverse, are presumptively fraudulent. (Geddes v. Anaconda Mining Co., 254 U. S. 590.)

holders and done in carrying out a fraudulent conspiracy, and that the transaction was fraudulent, *ultra vires*, illegal and void (Master's Findings 5, 6 and 7, F.R., pp. 129-130; 136-137).

The court made like findings that the stock was surrendered and cancelled at the time Phoenix fraudulently procured the bonds and found that it was done as a part of a fraudulent conspiracy to acquire the ownership of the bridge to the exclusion of the bridge company and its other stockholders (F.R., p. 180, Findings 6 and 7; F.R., pp. 196-199, Findings 35, 36, 37; F.R., pp. 200, 201, Finding 39. See Court's opinion, F.R., p. 157). And the court in its decree did not direct that the stock be returned to Phoenix (F.R., pp. 202-204).

Phoenix, recognizing that the issue as to the right to return of the stock had been adjudicated, filed its petition for rehearing and modification of decree and in it asserted: "As further ground for the relief herein prayed, Phoenix Finance Coporation shows to the court that through inadvertence, oversight or misapprehension of the facts in this case, the court invalidated $60,500 of bridge company bonds held by Phoenix Finance Corporation for which the last named company surrendered to the bridge company 517 shares of its capital stock, which was the admitted property of Phoenix at the time, and the court has wholly failed to reinvest Phoenix with this stock, but, on the contrary, has not alone invalidated the bonds but deprived Phoenix of the capital stock which it surrendered therefor" (F.R., p. 222). And prayed, among other things:

"Third. In case rehearing is denied, the decree be so modified as to reinvest in petitioner 517 shares of 'A' stock surrendered in exchange for bonds" (F.R., p. 223).

The allegations and prayer of the petition for rehearing and modification of decree were placed in issue by the answer of defendant and interveners thereto, alleging that "the 517 shares of capital stock surrendered to the bridge company were so turned over as a part of the fraudulent scheme, plan and conspiracy and to fraudulently procure from the bridge company $60,500 of bonds fraudulently issued, and that such transactions were but part and parcel of the fraudulent scheme, plan and conspiracy, and that the complainants are not entitled to have the * * * stock returned. That money or property used to perpetrate a fraud cannot be recovered" (F.R., p. 398).

The trial court ruled:

"Anticipating an adverse ruling, the petitioners alternatively pray for a modification of the decree with provisions commanding the re-issuing of certain shares of stock to Phoenix Finance Corporation, which it cancelled when fraudulently obtaining the bonds. One might conceive some invidious analogies to this situation. Having attempted the strong box of another and being hoist by what is now claimed to be a premature explosion, they volubly invoke the compassion of the court to retore valuable implements of their craft left behind. I see no reason why a court of equity should be deeply concerned in giving an affirmative relief to the Phoenix Finance Corporation. On the other hand, I think the petitions for rehearing should be denied and the motion to dismiss and vacate the decree overruled, and it will be so Ordered" (F.R., p. 413).

Phoenix Finance Corporation on appeal to the Circuit Court of Appeals, by its assignment of errors again presented the question of its right to said stock (Assign-

ments of error 10, 44, F.R., pp. 510; 522, 523, and especially assignment 62, p. 527).

Assignment 62 is as follows:

"The court abused its discretion in denying, as an alternative to the petition for rehearing, that the decree be so modified as to reinvest in the Phoenix Finance Corporation the 517 shares of 'A' stock surrendered by it to the bridge company in exchange for bonds."

The Circuit Court of Appeals overruled such assignments and held that Phoenix Finance Corporation was not entitled to the return of the stock. 98 Fed. (2) 416 at 428 (F.R. 1707-1708).

The Delaware case is in chancery and in it Phoenix Finance Corporation asks for the same thing, the reissuance of said 517 shares of stock, based on the same identical transaction which was before this court when such relief was denied. There was only one transaction in which the bridge company issued $60,500 of bonds in connection with the cancellation of 517 shares of stock, and that is the one which was involved in this case as a part of the fraudulent conspiracy and the one in which the stock was cancelled while Phoenix Finance Corporation was fraudulently obtaining the bonds. That matter has been fully determined by the federal courts (Exhibit SC-2, R., pp. 301-307; trial court's opinion, F.R., pp. 156-179; court's findings, F.R., pp. 180-202; court's opinion, F.R., pp. 411-413; F.R., pp. 829; 1262 first item; F.R., pp. 981-982; F.R., bottom p. 541).

Finding 9-C—The $500 and $12,110.19 Notes.

"c. That the said Phoenix Finance Corporation has commenced an action in the Superior Court of Delaware in and for New Castle County entitled

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware, versus the Iowa-Wisconsin Bridge Company duly organized and existing under the laws of the State of Delaware, being case No. 65, September Term, 1939, and has caused summons to be issued against said Iowa-Wisconsin Bridge Company returnable at Wilmington, Delaware, on the 18th day of September next, to answer said Phoenix Finance Corporation of a plea of trespass on the case, etc.; that said summons was caused to be issued on the 22nd day of June, 1939, and served on the defendant. That the alleged cause of action in said suit is based upon an alleged promissory note of $500.00, dated December 31, 1932, an alleged promissory note for $12,110.19, dated July 7, 1933, an alleged claim for $15,000 for money claimed to have been lent and advanced by defendant to plaintiff in that case and upon alleged claim for $7,000 claimed to have been for money due and payable from the defendant to the plaintiff in that case, Phoenix Finance Corporation, for interest and forbearance. That the said alleged promissory notes of $500.00 and $12,110.19 were involved in the above entitled cause and the adjudication thereof; that in this case it was claimed that said notes and the alleged considerations therefor formed part of the consideration for the issuance of $20,100 of bonds involved in this action. That this court found that the said bonds were fraudulently issued and wholly without consideration and were more than offset by indebtedness of Phoenix Finance Corporation and its predecessor, Phoenix Finance System, Inc., to this defendant, Iowa-Wisconsin Bridge Company. That as to the alleged claim for $15,000.00 this is a mere restatement of the alleged cause of action on the notes aforesaid stated in different form and in the alternative and the alleged claim for $7,000.00 is merely a claim for interest on the notes aforesaid set forth in a different form and

in the alternative. That all of said alleged claims were involved in and adjudicated in the above entitled cause in this court'' (R., pp. 708-709).

See paragraph 7(c) of the supplemental and ancillary bill (R., pp. 6-7; R., p. 98) and Phoenix answer, paragraph 7(c) (R., p. 149), which admit that it filed the answer described in paragraph 7(c), based upon promissory notes of $500 and $12,110.19, dated as set forth in the amendment, and that the Delaware cause claimed $7,000 and interest to July 1, 1939, and admits that the common counts in the sum of $15,000 were also pleaded in the action. It also admits that the court in its decree set forth that the mortgage and bonds sought to be foreclosed were fraudulently issued, and that all bonds, with the exception of certain bonds aggregating $15,000, were without valid consideration.

The suit referred to in this finding involves one note of $500 and one note of $12,110.19 (R., 6-7, 98; Exhibit S(-3, R., pp. 307-319), which were part of an alleged indebtedness to Phoenix Finance Corporation secured by $20,100 of bonds involved in this case and are in exactly the same position as the $3,125 note and the $2,000 note referred to above under sub-paragraph (a); the same record citations mentioned under sub-paragraph (a) above apply thereto, and for the purpose of brevity, will not be repeated here. The other allegations in the declarations are under the Delaware practice mere reiteration of the same alleged indebtedness in different form. All of said notes, to-wit: $2,000, $3,125, $500, $12,110.19, were part of an alleged indebtedness to the Phoenix Finance Corporation secured by $20,100 of bonds involved in this case and which this court and the Circuit Court of Appeals have found to be without consideration and now the

Phoenix Finance Corporation is attempting to sue on such notes, and to re-litigate the matter of consideration, which this court found did not exist.

The statement in petitioner's brief, page 31, that "There is no finding or conclusion, either of the master or of the district court, which is specifically and directly referable to the two notes of $12,110.19 and $5,000, respectively, for which Phoenix is suing the bridge company in Delaware in this action," as hereinbefore noted above is without foundation.

This statement must be criticized in the same manner as the similar statement made with reference to the $2,000 note. All that has been said in the comment under finding 7(a) here applies because the two notes here involved represented a part of the claimed indebtedness of $17,735.19, for which it was claimed that the $20,100 of bonds had been given as collateral security; the notes were constantly referred to in the testimony in the exceptions; in the petition for rehearing, and in the former brief of counsel for Phoenix, as has been specifically pointed out, and the bonds securing them were specifically held by the master, the district court, and the Circuit Court of Appeals, to have been without consideration and offset by indebtedness of Phoenix to the bridge company, and it was specifically held by the master and both courts that there were no underlying considerations for them and consequently no underlying considerations for the notes.

Finding 9-D—The Fraudulent Guaranty Agreement.

"d. That the said Phoenix Finance Corporation commenced another action in the Superior Court of Delaware in and for New Castle County, entitled

Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware versus the Iowa-Wisconsin Bridge Company, duly organized and existing under the laws of the State of Delaware, being Case No. 64, September Term 1939, and caused summons to be issued against said Iowa-Wisconsin Bridge Company returnable at Wilmington, Delaware, on the 18th day of September next, to answer said Phoenix Finance Corporation of a plea 'that it hold and keep with it the covenant between them made according to the force and effect of said articles of agreement between them, etc.' That the said Phoenix Finance Corporation caused said summons to be issued on the 22nd day of June, 1939, and caused the same to be served on the defendant. That the alleged cause of action in said suit is based on an alleged agreement claimed to have been entered into between Phoenix Finance System, Inc., John W. Shaffer & Company, and Iowa-Wisconsin Bridge Company, dated November 10, 1930, under and by virtue of which said Phoenix Finance Corporation claims defendant became indebted to Phoenix Finance System, Inc., in the sum of $21,-262.71, claims to be the assignee of said Phoenix Finance System, Inc., and claims the total sum of $50,000.00 for principal and interest; that attached to the declaration in said case is a copy of said purported agreement. That said agreement so referred to in said declaration and sued upon is the same agreement described and referred to by this court in its finding of fact No. 24, appearing at pages 13, 14 and 15 of Exhibit B attached to the Supplemental and Ancillary Bill of Complaint, which the court found to be without consideration, a fraud upon the bridge company, void and *ultra vires*" (R., p. 709).

See paragraph 7(d) of the supplemental and ancillary bill (R., pp. 7, 98-99) and Phoenix answer, paragraph 7(d) (R., pp. 149-150), as follows:

"Answering paragraph 7(d) Phoenix admits the allegations thereof contained in the supplemental and ancillary bill before amendment, and admits the allegations contained in the first sentence of the paragraph added to paragraph 7(d) by amendment: (being the same as the first sentence of finding 9(d)) *admits that the agreement sued upon in said Delaware action* is referred to in finding No. 24 of this court." (Emphasis supplied.)

The suit referred to in this finding is an action to recover on an alleged guaranty agreement dated November 10, 1930 (R., pp. 7, 98-99; Exhibit SC-4, R., pp. 320-339).

This is the same identical fraudulent guaranty agreement that was involved in this case (Exhibit Johns A-G and also known as Exhibit Shaffer "E," F.R., p. 1393, bottom, and pp. 1394 and 1395). Said declaration in connection with such alleged guaranty agreement makes reference to contract between John W. Shaffer & Company and McClintic-Marshall Company and to a contract between John W. Shaffer & Company and Industrial Contracting Company, both of which were involved in this case (Exhibit SC-4, R., pp. 325-328; R., pp. 328-334; Exhibit Shaffer "D," F.R., pp. 850-851; 568-587; Exhibit Pendergast "F," F.R., pp. 1395-1399; 623-624). The alleged guaranty agreement forming the basis of this Delaware action was found without consideration, fraudulent, void and *ultra vires* by the trial court in this case. (Court's Opinion, F.R., pp. 170-172; Court's Finding of Fact No. 24, F.R., pp. 189-191.) The court further found that Phoenix Finance Corporation was indebted to the bridge company for the $14,000 of stock which it procured under said fraudulent guaranty contract (Court's Finding of Fact No. 27, F.R., pp. 192-193). The $21,262.71

claimed in this Delaware action is the $10,000 which it was claimed in this case was advanced by the Phoenix Finance System, Inc., to pay the Industrial Contracting Company and the $11,262.71 to pay McClintic-Marshall & Company, and which it was claimed in this case constituted a consideration for the issuance of bonds to the Phoenix Finance Corporation, and which both courts below found were not obligations of nor owed by the bridge company, and furnished no consideration for the issuance of the bonds. (Court's Findings of Fact Nos. 32, 33 and 34; F.R., pp. 194-196 and 281 and Court's Finding of Fact No. 40, pp. 201-202; opinion Circuit Court of Appeals, F.R. 1702-1703.)

Finding 9-E—The Helmer Anderson Bonds.

"e. That the said Phoenix Finance Corporation commenced another action in the Superior Court of Delaware in and for New Castle County, entitled Phoenix Finance Corporation, a corporation duly organized and existing under the laws of the State of Delaware, versus the Iowa-Wisconsin Bridge Company, a corporation duly organized and existing under the laws of the State of Delaware, being Case No. 79, September Term 1939, and caused summons to be issued against said Iowa-Wisconsin Bridge Company returnable at Wilmington, Delaware, on the 18th day of September next, to answer said Phoenix Finance Corporation of a plea of trespass on the case, etc. That said Phoenix Finance Corporation caused said summons to be issued on the 11th day of July, 1939, and served on the defendant. That the alleged cause of action in said suit is based on certain of the bonds which were involved in the above entitled action, to-wit: One series B Bond No. 93 in the face amount of $500.00; one Series B Bond No. 97 in the face amount of $500. That this court in its final decree, adjudged and held that all bonds held by Phoenix Finance Cor-

poration were invalid, fraudulent and issued without consideration, and that this court found certain bonds which had been issued to Helmer Anderson in the total amount of $7,400.00 to be valid to the extent of $6,000.00 only, and directed that said sum of $6,000.00 be paid from income of the bridge company; that said Series B Bonds Nos. 93 and 97, upon which suit has been commenced in the State of Delaware as hereinbefore set forth, are portions of the $7,400.00 of the bonds issued to Helmer Anderson and allowed in part by this court as aforesaid.

"That sixty-seventy-fourths (60/74) of the face value of said bonds with accrued interest to May 1, 1939, has been available since May 1, 1939, and will be paid to the lawful holder of said bonds by the receiver of this court on surrender of said bonds" (R., pp. 709-710).

See paragraph 7(e) of the supplemental and ancillary bill (R., pp. 7, 99) and Phoenix answer, paragraph 7(e) (R., p. 150), which admits that it filed the action described in paragraph 7(e), and admits that its cause of action in Delaware is based upon two Series B bonds of the bridge company, numbered 93 and 97, in the face amount of $500.00 each; admits that bonds in the total amount of $7,400, originally issued to Helmer Anderson, were allowed by this court to the extent of $6,000, and were directed to be paid from income of the bridge company, and admits that said bonds numbered 93 and 97 constitute part of the bonds originally issued to Helmer Anderson by the bridge company.

This suit is an action to recover on bonds numbered 93 and 97 of the Iowa-Wisconsin Bridge Company (R., pp. 7, 99; Exhibit SC-5, R., pp. 340, 373).

This court decreed that all of the bonds were fraudulent and without consideration except bonds aggregat-

ing $15,000 specified and held by others than the Phoenix Finance Corporation (F.R.., pp. 203-204). There were issued to Helmer N. Anderson on a $6,000 consideration $7,400 of bonds (F.R., pp. 985-986). These were allowed by the court in its decree to the extent of $6,000 (F.R., p. 204). These bonds to Helmer N. Anderson include bonds numbers 93 and 97. There was only one issue of bonds of the bridge company, all of which were involved in this action. Phoenix Finance System, Inc.'s bonds were all disallowed and the only bonds that Phoenix in the Delaware suit can now be attempting to sue on by said numbers 93 and 97 are bonds issued to Helmer N. Anderson, the partial allowance of which is also covered by the decree in this case. Helmer N. Anderson and any successor of his to any of said bonds is bound by the decree in this cause and it is not necessary to determine at this time whether Phoenix acquired said two bonds and is the lawful holder thereof. In any event, it is not entitled to maintain an action thereon in Delaware. Such bonds must be presented to the district court. Instead of presenting the bonds to the district court for payment in accordance with the terms of the decree, Phoenix is attempting to recover in the courts of Delaware the full amount of the bonds with interest on the full amount in direct violation of the terms of the decree.

Finding 9-F—All Issues in Delaware Suits Determined in Former Decree.

> "f. That all ultimate facts and issues involved and presented in each of the actions above referred to now pending in the courts of the State of Delaware and brought by the Phoenix Finance Corporation against the Iowa-Wisconsin Bridge Company and specified or referred to in the Supplemental and

Ancillary Bill of Complaint as amended of the Iowa-Wisconsin Bridge Company, were within the issues involved and were fully considered and determined by the trial court in its original final decree and order denying petition for re-hearing and for modification of decree, which court order and decree were affirmed by the Circuit Court of Appeals for the Eighth Circuit.

"Cause No. 159, September Term, 1939, in the Superior Court of the State of Delaware in and for New Castle County, involving alleged toll tickets, and defenses thereto, is excepted herefrom" (R., pp. 710-711).

This is a general finding based on the court's judicial knowledge and the entire record in this case.

Finding No. Ten.

"That John A. Thompson, who was found by this court in this case, as controlling the Phoenix Finance Corporation, while dominating and controlling the bridge company in a fraudulent scheme, plan and conspiracy to cheat and defraud the bridge company and stockholders, asserted on the 8th day of July, 1939, that there never was any litigation between Phoenix and the bridge company; that the alleged indebtedness of the bridge company and the Phoenix could be properly presented and put down in the Delaware court; that there were six cases down there now that would be carried on through the courts in the next few months; one all finished, except the decision of the court, and five others to follow" (R., p. 711).

See paragraph 9 of the supplemental and ancillary bill (R., p. 8) and Phoenix' answer (R., p. 150), which admits "that on the 8th day of July, 1939, John A. Thompson

did say that there were six suits pending in the State of Delaware that would be carried on in the course of the next few months."

The finding with reference to control, see former record, finding of master 4(a), approved by court (F.R., pp. 179-180); finding of court 19 (F.R., p. 188); finding 24 (F.R., p. 190); finding 26 (F.R., pp. 191-192); findings 27, 28, 29, 30 (F.R., pp. 192-194); finding 35 (F.R., p. 196); finding 37 (F.R., pp. 197-198); finding 40 (F.R., pp. 201-202). See resistance of Phoenix to motion depositions be not taken (R., p. 201, lines 8-10, offered, p. 269; R., p. 204, lines 3-10, offered, R., p. 270).

Finding No. Eleven.

"That said John A. Thompson on the 23rd day of November, 1938, wrote the stockholders of the Iowa-Wisconsin Bridge Company: 'I am not asking you or any other man to help me or to help Phoenix; Phoenix does not need any help in its fight to maintain its creditor position. In the end the facts will all be proved in competent courts, I am not a bit disturbed about the final outcome,' etc.

"That on the 12th day of June, 1939, the said John A. Thompson, president of the Phoenix Finance Corporation, wrote to a stockholder and director of the Iowa-Wisconsin Bridge Company:

"'Now Phoenix claimed outright ownership of $97,000 and $60,500, or a total of $157,500 of bridge bonds. The $60,500 were bonds received in connection with the retirement of 517 shares of preferred stock which was unquestionably owned and paid for by Phoenix, so if the bonds were no good, certainly the bridge company must return the 517 shares of preferred stock to Phoenix. A suit is now pending in Delaware to enforce the bridge company to do

that which it should in fairness and honesty do without a lawsuit, and there is not the slightest doubt that the Delaware courts will make the bridge company make good on the $60,500 of bonds or return the 517 shares of preferred stock. So while this lawsuit may have resulted in the elimination of the $60,500 of bonds as a bonded debt, that was not a gain of $60,500 to the bridge company by any means.

" 'As to the $97,000 worth of bonds, even if the mortgage deed of trust had been adjudicated and eliminated, and it is still shown that the bridge company owes the $97,000 for legitimate borrowings, it makes little difference whether the bridge company pays the debt by reason of a mortgage foreclosure or by way of a judgment and execution against the bridge.

" 'We have to this point accounted for $22,400 of bonds in the hands of third parties, eliminated by legitimate retirement of the full amount owing thereon, and $157,500 worth of bonds, the collection of which has been temporarily stayed, making a total of $179,900 and leaving $20,100 yet to be accounted for.

" 'These $20,100 of bonds were pledged as collateral against bridge company notes for borrowed money, totaling $17,735.19. Suits are now pending on these notes in the Delaware courts, and there is not the slightest chance that they will not be collected, because here Phoenix will have opportunity to present its evidence, which was never done in any of the proceedings in Federal Court, and could not properly be done because Phoenix and the bridge company both being Delaware corporations, could not carry on as proper parties with adverse interests in a Federal Court proceeding, as you well know.'

"That all of said matters were involved in this cause and determined by this court's decisions" (R., pp. 711-712).

See paragraph 10 of the supplemental and ancillary bill (R., pp. 9-10) and Phoenix answer, paragraph 10 (R., pp. 150-151), admitting that John A. Thompson on November 23, 1938, wrote a letter to the stockholders of the bridge company containing the substance of, but not precisely, the matter as it is purported to be quoted in the supplemental and ancillary bill herein, and admitting that on June 12, 1939, John A. Thompson wrote to a stockholder and director of the bridge company substantially, but not precisely, as quoted in paragraph 10 of the supplemental and ancillary bill herein, and offering to present due and correct copies of said letters at the trial.

See also Exhibits "A" and "B" attached to schedule, entitled testimony of John A. Thompson, a part of resistance of Phoenix to motion that depositions be not taken (R., pp. 211-214; 214-217; offered, R., pp. 270-271).

Finding No. Twelve—Recording of Mortgage.

"That on June 2, 1939, the complainant, Phoenix Finance Corporation, caused to be recorded in the office of the County Recorder in Book L, pages 625, 626, of Allamakee County, Iowa, and on the 18th day of May, 1939, caused to be recorded in the office of the Registrar of Deeds of Crawford County, Wisconsin, in Volume 153, page 293, an alleged mortgage of the Iowa Wisconsin Bridge Company to the Phoenix Finance System, Inc., in the sum of $50,000 dated March 10, 1931, which this court in this cause found to be without consideration, fraudulent and void, issued as a part of a scheme, plan and conspiracy to cheat and defraud the bridge company and its stockholders. That by the recording of said alleged mortgage said Phoenix Finance Corporation has wrongfully cast a cloud upon the title of the defendant to its property and has attempted to render null and

void that portion of the findings and decree and order of this court finally determining the invalidity of said mortgage'' (R., pp. 712-713).

See paragraphs 11 and 12 of the supplemental and ancillary bill (R., pp. 10-11) and Phoenix answer, paragraph 11 (R., p. 151), denying each and every allegation of paragraph 11 except the admission that on June 2, 1939, it caused to be recorded in the office of the County Recorder in Book L, pages 625-626 of the records of Allamakee County, Iowa, a certain mortgage executed by the bridge company to Phoenix Finance System, Inc., in the sum of $50,000, dated March 10, 1931, and admitting that the trial court in its findings made reference to this mortgage substantially as set forth in paragraph 11 of the supplemental and ancillary bill herein.

The trial court in this cause originally found:

''That in truth and in fact no indebtedness of said bridge company to the Phoenix Finance System, Inc., existed and the bridge company received no consideration for the execution of said mortgage; that the same was and is wholly without consideration, fraudulent and void. At said time said Thompson caused entries to be made on the books of said bridge company purporting to show the receipt of $50,000 in cash, whereas, in truth and in fact, said amount and no part thereof was received by the bridge company'' (court's finding No. 26, F.R., pp. 191-192; also court's opinion, F.R., pp. 172-173).

And the trial court found that bonds of the bridge company were issued for this fraudulent mortgage to the Phoenix (court's finding No. 40, F.R., p. 201).

The court held all the bonds issued to Phoenix fraudulent and without consideration. Phoenix Finance

Corporation in its petition for rehearing, in the alternative, prayed:

"Second. In case rehearing is denied, then as alternative, relief that the decree be modified so as to withhold from adjudication the question of the validity of the $50,000 mortgage given by the bridge company to petitioner, reserving the right to petitioner to litigate said mortgage in another action, if it so desires" (F.R., p. 223). Which petition was overruled (F.R., pp. 411-413). The order of the trial court overruling the petition was sustained by the Circuit Court of Appeals (F.R. 1707).

Finding No. Thirteen.

> "That the complainant Phoenix Finance Corporation as hereinbefore set forth is threatening to and unless restrained by this court will proceed to institute and prosecute actions as aforesaid and will permit to remain on record the invalid $50,000 mortgage aforesaid; that unless said complainant Phoenix Finance Corporation is restrained by this court as herein prayed the defendant will be deprived of the fruits and advantages of the judgment, decree and orders of this court in this cause and said complainant will continue with vexatious suits in utter disregard thereof; that the acts of said Phoenix Finance Corperation will cast a cloud over defendant's title and franchise because of a multiplicity of vexatious suits brought and to be brought against defendant and it will be damaged in a way that cannot be repaired or estimated at common law, and from these threatened wrongs the defendant has no remedy at common law but the only remedy is in equity" (R., p. 713).

See paragraph 12 of the supplemental and ancillary bill (R., pp. 10-11) and Phoenix answer, paragraph 12

(R., p. 151) denying each and every allegation of paragraph 12, except that it admits it intends to prosecute the actions described in paragraph 7 of the supplemental and ancillary bill and proposes to permit to remain on record the $50,000 mortgage above described to the extent that it is not restrained by injunction.

This finding is based on the court's judicial knowledge and the entire record in the case.

The Court then made its conclusions of law (R., pp. 713-717).

See also court's opinion (R., pp. 717-718).

FINAL DECREE.

The court ordered, adjudged and decreed that the complainant Phoenix Finance Corporation, its officers, agents, servants, employees and attorneys, be permanently enjoined and restrained in anywise from prosecuting, conducting or carrying forward in any manner whatsoever any and all of the matters, things and questions joined in the actions of law and equity instituted by the Phoenix Finance Corporation against the Iowa-Wisconsin Bridge Company in the State of Delaware, and the decree then describes the five law suits enumerated in the court's finding of fact.

The court further decreed as follows:

> "That said Phoenix Finance Corporation, its officers, agents, servants, attorneys and employees and all those acting by or through or for them and its successors and assignees, jointly and severally are commanded and ordered forthwith to satisfy, release and remove from the records of the Recorder's office of Allamakee County, Iowa, and from the records of

the Registrar of Deeds of Crawford County, Wisconsin, that certain mortgage executed by Iowa-Wisconsin Bridge Company to Phoenix Finance System, Inc., dated March 10, 1931, covering the property and assets of Iowa-Wisconsin Bridge Company, which said mortgage was filed for record and recorded in the office of the Recorder of said Allamakee County, Iowa, on or about the 2nd day of June, 1939, and recorded in Book L, pages 625, 626, and which was recorded in the office of the Registrar of Deeds of Crawford County, Wisconsin, on the 18th day of May, 1939, and recorded in Volume 153, page 293, and that they deliver the original of said mortgage and note secured thereby for cancellation to the Clerk of this Court.

"And the said Phoenix Finance Corporation, its officers, agents, servants, employees and attorneys are hereby directed and commanded to forthwith dismiss the aforesaid cases at the cost of the Phoenix Finance Corporation.

"And the said Phoenix Finance Corporation, its officers, agents, servants, employees and attorneys are hereby permanently enjoined and restrained from commencing, prosecuting, or bringing in question, or in any manner carrying forward any suits or causes of action involved in or determined in the Findings of Fact and Conclusions and Final Decree dated December 1, 1936, and order denying petition for rehearing and modification of decree filed in this cause on March 4, 1937.

"That the entire costs in this case on supplemental and ancillary bill be taxed to complainant, Phoenix Finance Corporation" (R., pp. 719-722).

Phoenix served notice of appeal (R., pp. 723-724) and procured order granting stay and approving supersedeas bond (R., pp. 725-726), and filed supersedeas bond (R., pp. 724-725).

On the 18th and 19th days of September, 1940, the appeal was argued before the Circuit Court of Appeals and submitted (R. 766-767) and that court on the 26th day of October, 1940, rendered its opinion and decree affirming the decision of the trial court (R. 767-788). And petition for rehearing was denied by that court on November 16, 1940 (F.R. 831).

ARGUMENT.

POINT ONE.

(Answer to Petitioner's Point One.)

Petitioner's point is not applicable. The effect of the decrees and orders of the federal courts in the instant case is controlled by the decisions of the Supreme Court of Iowa and of this court.

In this case the writ of certiorari is to the Circuit Court of Appeals for the Eighth Circuit to review its decision affirming a decree of injunction rendered by the United States District Court for the Northern District of Iowa to enforce its own decrees and orders and to preserve the fruits thereof. The writ does not involve the question whether the Federal Court gave full faith and credit to the decisions of another court. No such question was involved. No decision of another court was pleaded or offered in evidence. In fact, the decision of the Delaware Superior Court referred to by petitioner was not then in existence.

The rule is of almost universal application that questions of whatever nature, not raised and properly preserved for review in the trial court, will not be noticed on appeal.

> 4 Corpus Juris Secundum 430, Sec. 228.
> *Duignan* v. *United States, et al.*, 274 U. S. 195.

No such question was presented by petitioner's answer (R. 147) or mentioned in the trial court's decision (opinion, R. 717, 32 Fed. Supp. 277) nor in petitioner's statement of points on which it intended to rely on appeal (R. 732-735), nor presented by petitioner in Circuit Court of Appeals nor mentioned in its decision. (Opinion Circuit Court of Appeals, R. 767-786; 115 Fed. (2) 1.)

The order granting preliminary injunction was rendered on the 28th day of September, 1939, and final hearing on permanent injunction was had and the cause submitted on the 11th day of March, 1940, and the final decree of permanent injunction was entered March 23, 1940.

In Freeman on Judgments (5th Ed.), Vol. 2, Sec. 1070, pages 3018, 3019, it is stated:

> "Within the limits of their jurisdiction, and the limitations hereinafter stated, the judgments and decrees of the Federal Courts generally are entitled to the same force and effect, so far as *res judicata* and collateral attack are concerned, as would be accorded to the judgment of a state court of record under like circumstances." Citing:
>
> *Bigelow* v. *Old Dominion Copper Co., supra.*
> *Pittsburgh C. C. & L. Ry. Co.* v. *Long Island L. & Tr. Co.* 172 U. S. 493, 43 L. ed. 538, 19 S. Ct. 238.
> *Thompson* v. *Lee County*, 22 Iowa 206.
>
> "Thus it has been said that 'judgments and decrees of the Circuit Court of the United States sitting in a particular state, in the courts of that state, are to be accorded such effect, and such effect only, as would be accorded in similar circumstances to the judgments and decrees of a state tribunal of equal authority;' and whether they have been accorded such effect is a question the determination of which is within the jurisdiction of the Supreme Court of the United States." Citing:
>
> *Crescent L. S. Co.* v. *Butchers' Union*, 120 U. S. 141, 30 L. ed. 614, 7 S. Ct. 472
> *Hancock Nat. Bank* v. *Farnum*, 176 U. S. 640, 44 L. ed. 619, 20 S. Ct. 506.

The effect which a judgment has in the state where rendered is precisely the effect which must be accorded it in every other state court. The effect of the decrees and orders of the Federal Courts in the instant case is controlled by the decisions of the Supreme Court of Iowa and of this court.

U. S. Revised Statutes, Sec. 905.
Freeman on Judgments (5th Ed.), Vol. 2, Sec. 3186.
Marin v. *Augedahl*, 247 U. S. 142, 62 L. ed. 1038, 38 S. Ct. 452.
Fauntelroy v. *Lum*, 210 U. S. 230, 52 L. ed. 1039, 28 S. Ct. 641.
Harding v. *Harding*, 198 U. S. 317, 49 L. ed. 1086, 25 S. Ct. 679.
Hanley v. *Donaghue*, 116 U. S. 1, 29 L. ed. 535, 6 S. Ct. 242.
Owsley v. *Central Trust Co.*, 196 Fed. 412.
Carpenter v. *Beal-McDonnell & Co.*, 222 Fed. 453.
Ashby v. *Manley*, 191 Iowa 113, 181 N. W. 869.
Bigelow v. *Old Dominion Copper Mining & Smelting Co.*, 225 U. S. 111, 32 S. Ct. 641-644.

The long-established rule of national courts as to the effect of judgments as *res judicata* is re-stated in the opinion of the Circuit Court of Appeals in this cause and the decisions of the Supreme Court of Iowa are in harmony therewith.

Phoenix Finance Corporation v. *Iowa-Wisconsin Bridge Co.*, 115 Fed. (2) 1.
King City, Mo. for use and benefit of U. S. Cast Iron Pipe and Foundry Co. v. *Southern Surety Co.*, 212 Iowa 1213, 238 N. W. 93.

POINT TWO.

(Answer to Petitioner's Point Two.)

The decrees and orders of the District Court and of the Circuit Court of Appeals in the foreclosure cause constitute adjudications against Phoenix of the several issues and controversies involved in the supplemental and ancillary proceedings.

(a) Phoenix was a party by representation, and an ancillary party (F.R. 1689 at 1694).

> *First Trust & Savings Bank* v. *Iowa-Wisconsin Bridge Co.*, 98 Fed (2) 416 at 421, Cert. den. 305 U. S. 650, Rehearing den. 305 U. S. 676.

The fact that a party to a judgment is merely a "proper" and not a "necessary" pary does not relieve him from the conclusive effect of the adjudication.

> Freeman on Judgments (5th Ed.) Vol. 1, Sec. 430, p. 936.

One, thought not a party, is bound by the judgment in a suit prosecuted at his instance and on his behalf and for his benefit.

> Freeman on Judgments (5th Ed.), Vol. 1, sec. 430, p. 638.
> *Souffrant* v. *La Compagnie & Des Sourcreries*, 217 U. S. 475.

Where a *cestui que trust* employs counsel and has an answer filed in the name of the trustee the decision is *res judicata* between the same plaintiff and the *cestui que trust*, on the same subject matter.

> *Plumb* v. *Crane, Admr., etc.*, 123 U. S. 560.

The decree provides (F.R. 214): "That the bill of the *plaintiffs* be dismissed as to the plaintiff, Phoenix Finance Corporation, and the prayer of the bill denied, except insofar as the decree provides for the protection of the bondholders of said $15,000 in bonds; that foreclosure and sale of the mortgage property be denied," etc., and then provides for sequestration of income.

The entire bill was dismissed, except insofar as relief was provided for certain holders of bonds. It was dismissed as to both the trustees and Phoenix, as far Phoenix was concerned.

> "A general judgment or decree of dismissal, with nothing more, renders all the issues in the case *res judicata*, and constitutes a bar to any subsequent suit for the same cause of action. Hence when a court dismisses a suit upon some ground which does not go to the merits of the action, but leaves them open to consideration in another court, or at another time, or in another way, the decree of dismissal must expressly adjudge that it is rendered for the specific reason upon which it is based, or must expressly provide that it is made without prejudice."
>
> *Hickey* v. *Johnson* (8 CCA), 9 Fed. (2) 498, 501.

(b) Phoenix was represented by the trustees as to the claimed obligations of the bridge company to Phoenix. Whether called "underlying obligations" or just "obligations" is immaterial. It designates the same claimed debts put forward as considerations for the bonds and now put forward in the Delaware cases.

Not only was the action instituted at the request and instigation of Phoenix and carried on under its direction by attorneys of its selection at its expense, but the trust deed expressly authorized the trustees to represent it as to the claimed indebtedness.

Article 5, Section 10 of the trust deed (F.R. 41-42) provided:

> "and in case the company shall fail to pay the same forthwith upon such demand, the trustees in their own names, and as trustees of an express trust, shall be entitled to recover judgment for the whole amount so due and unpaid.
>
> "The trustees shall be entitled to recover judgment as aforesaid, *either before* or *after* or *during* the pendency of any proceeding for the enforcement of the lien of this indenture upon the trust property, and the right of the trustees to recover such judgment shall not be affected by any sale hereunder, or by the exercise of any other right, power or remedy for the enforcement of the provisions of this indenture, or for the foreclosure of the lien hereof; * * *"

In the case of *McPherson* v. *Commercial Building & Securities Co.*, 206 Iowa 562, 218 N. W. 306, the court said:

> "In the deed of trust set forth in the petition, the trustee was the pledgee of the securities, and was the proper representative of all the bondholders, with full power both under the trust deed and under the statute, Sections 12364-12371, Code 1924. Plaintiff's bond carried the written attestation of the trustee. *There was no lack of privity as between the holder of the bond and such trustee.*" (Emphasis supplied.)

Section 10968 of the Code of Iowa of 1931, 1935 and 1939 provides:

> "Plaintiff as legal representative. An executor or administrator, a guardian, a trustee of an express trust, a party with whom or in whose name a con-

tract is made for the benefit of another, or party expressly authorized by statute, may sue in his own name, without joining with him the party for whose benefit the action is prosecuted."

Equity Rule 37, 28 U.S.C.A., following Section 723, provides:

"Every action shall be prosecuted in the name of the real party in interest, but an executor * * * trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another * * * may sue in his own name without joining with him the party for whose benefit the action is brought."

Equity Rule 10 as amended May 4, 1925, 28 U.S.C.A., following Section 723, provides:

"In suits for the foreclosure of mortgages or for the enforcement of other liens a decree may be rendered for any balance found to be due over and above the proceeds of the sale or sales; and execution may issue for the collection of the same as is provided in rule 8 when the decree is solely for the payment of money. Such a deficiency decree may be so rendered and enforced whether the plaintiff owns the debt or is a trustee or agent for another or others who own it, as often is true when the debt is evidenced by notes or bonds. Where the plaintiff is such trustee or agent, any money collected on the execution shall be paid to him as such representative, and he shall pay it to the owner of the debt if there be only one, and if there be more shall distribute it *pro rata* among them according to their respective interests."

Petitioner cites *Mackay* v. *Randolph Coal Company* (8 CCA, decided May 4, 1910), 178 Fed. 881. That case

involved a question of merger and was decided under the earlier equity rules, which were amended before the trial of the present case as above set forth, and that case is not now an authority for the proposition for which it is cited.

In *Lane* v. *Equitable Trust Company of New York* (Nov. 24, 1919, 8 CCA), 262 Fed. 918, cert. den. 252 U. S. 578, wherein the mortgage deed of trust, securing the bonds, contained the same provisions as those in the instant case, quoted above, the court held that the complainant trustee was entitled to a deficiency judgment to pay the indebtedness secured by the deed of trust.

Also see:

Fidelity Philadelphia T. Co. v. *Hale-Kilbourn Corp.* (Sept. 16, 1937), 24 Fed. Supp. 3, 11.
Hartford Acc. Ins. Co. v. *Southern Pac. Co.*, 273 U. S. 207, 47 S. Ct. 357, at 360.

Petitioner cites the case of *Iowa Title & Loan Co.* v. *Clark Bros., et al.*, 213 Iowa 875, 237 N. W. 336. In that case there were a series of notes secured by the same mortgage and the court held that one or more of the note owners might sue and recover at law and later enforce the mortgage lien, while holders of other notes might in the first instance avail themselves of their remedy by foreclosure. But that is not what the petitioner did in the instant case. Here Phoenix procured a fraudulent deed of trust, securing the bonds, and the claimed considerations thereof, covering every item of property owned by the bridge company, adopting that as its weapon. The case does not hold that a person may have trustee proceed with the foreclosure of a mortgage or deed of trust to recover the claimed debt secured thereby, and having been defeated on the ground that there was

no consideration and no debt existed, proceed to sue again on the same pretended indebtedness, nor does it hold that a person may sue on notes and having been defeated on the ground that there was no consideration, that he may then sue in the name of trustees for the foreclosure of a mortgage claimed to secure the same notes.

In *Iowa Title & Loan Co.* v. *Clark,* 215 Iowa 929, 247 N. W. 211, in which under a trust agreement giving to the trustee powers similar to but not as elaborately stated as the powers set forth in the trust deed in this case, the trustee brought one action to foreclose a mortgage as to certain of the notes for which the mortgage was security, and an action at law to recover upon the remaining notes. The Iowa court specifically held that the owners of the notes having constituted the plaintiff their trustee to enforce collection of the debt represented by the notes, and the Iowa law (Section 10968, Codes 1927 and 1931) providing that a trustee of an express trust * * * may sue in his own name without joining with him the party for whose benefit the action is prosecuted, the right to prosecute the action on the notes was in the trustee, and stated:

> "Under our statute the plaintiff, as such trustee of an express trust, had authority to bring action against the defendants in its own name without joining with it the beneficial owners of the notes. Aside from its duty as trustee to distribute the proceeds of the trust fund to those entitled thereto, the plaintiff was in no different position than if it were prosecuting this action as the absolute owner of the notes."

Petitioner cites a fraudulent conveyance case, *Clemens* v. *Elder, et al.,* 9 Iowa 272, wherein Elder conveyed lands

to James H. Grower and received a bond for the reconveyance of the same upon the payment of $3,750.00 within one year as evidenced by two notes payable to J. H. Grower Bros. & Co., and an action was brought to set aside this deed as a fraudulent conveyance and it appears that James H. Grower in fact held the title for the firm to which the notes were payable, or their endorsers, or both, none of whom were made parties. The court held the proper parties had not been made defendants. In that case there was no trust deed such as in the instant case authorizing the trustee to represent all parties interested. That case has no similarity in facts to the case at bar and obviously is not an authority for the proposition for which petitioner cites it.

Petitioner cites *Miller* v. *Mahaffy,* 45 Iowa 289, wherein plaintiffs claimed to be the owners of land by virtue of written contract with the Burlington & Missouri R. R. Co.; that said contract of purchase was taken in the name of Robert Miller, and that he held the title as trustee for plaintiffs and not as owner, and that he fraudulently assigned the contract to defendant Mahaffy, who had knowledge thereof, and there was evidence tending to show that plaintiffs and Miller owned this land in common; that the sale to Mahaffy was not without consideration. Miller, although named as a party defendant, had not been served with notice of the action. The court held that under such circumstances there was a defect of parties, and that the court could not proceed at all until Miller was made a party. There was no instrument by virtue of which Mahaffy might act for Miller in the protection of his interests, and the case is not an authority for petitioner's contention as to representation.

Petitioner cites *Central Trust Co.* v. *California and N. R. Co.* (C.C.N.D. Cal., 1910), 110 Fed. 70. That case involved the right of individual bondholders in a suit by a trustee to foreclose a mortgage securing bonds to intervene for the purpose of contesting the validity of certain bonds, no answer having been filed by the defendant railroad company. There should be added to petitioner's quotation from the decision just ahead of it: "The objection that the intervener, Chas. H. Smith, is not legally or equitably entitled to intervene in this action as against the other bondholders cannot be sustained." And added to the end of the quotation: "An intervention is permissible and proper in such case, for the reason that the interests of the trustee and the intervening bondholder have ceased to be identical." In the instant case no exception was ever raised to the action or want of action of the trustees. On the contrary, the record in this case discloses that the trustees promptly at the request of Phoenix filed the original bill and thereafter appeared by counsel of Phoenix' selection and prosecuted the suit at all times and stages diligently. They did everything that Phoenix wanted them to do.

In this connection see *McPherson* v. *Commercial Building and Securities Co., et al.*, 206 Iowa 562, 218 N. W. 306.

In the case of *Kerrison* v. *Stewart*, 3 Otto 155, it was held:

> "Where a trustee represents his beneficiaries in all things relating to the trust property, they are not necessary parties to a suit against him by a stranger to *enforce or declare void the trust.*"

The court said:

> "In such casse the trustee is in court for and on behalf of the beneficiaries, and they, though not parties, are bound by the judgment, unless it is impeached for fraud or collusion between him and the adverse party. * * * The principle which underlies this has always been applied in proceedings relating to railway mortgages, where a trustee holds the security for the benefit of bondholders. It is not, as seems to be supposed by the counsel for the appellants, a new principle developed by the necessity of that class of cases, but an old one, long in use in analogous cases, and found to be well adapted to the protection of the rights of those interested in such securities."

In *Mercantile Trust Co.* v. *Schlafly* (CCA 8), 299 Fed. 202, which was a suit by a trustee in bankruptcy against a trustee under a mortgage securing bonds to recover money collected by defendant for interest on bonds within four months prior to bankruptcy, and not disbursed to the bondholders, it was claimed that the bondholders were necessary parties. The court held that they were not; that they were all represented by the trustee.

In *Beals* v. *Ill. M. & T. R. R. Co.*, 133 U. S. 290, the court said:

> "Upon the facts thus established no ground is shown for maintaining the bill. The former judgment was rendered by a court of competent jurisdiction, in which not only the railroad company that issued the bonds, but the surviving trustee under the mortgage, made in the name of another company to secure payment of the bonds, were made parties. *The bondholders were thus fully represented in that suit, and bound by the decree, cancelling and annulling the bonds and mortgage.*"

In *Elwell* v. *Fosdick,* 134 U. S. 500, where a decree had been entered and a sale made and confirmed in a suit to foreclose a first mortgage on a railroad, in which the trustee under second mortgage was made a party, and a release of errors in the proceeding executed by such trustee, the court said:

> "The trustee represented the bondholders not only in the proceedings which resulted in the entry of the decree, so that the bondholders were not necessary parties, but he bound them by his release of errors."

To the same effect see *Manson* v. *Duncanson,* 166 U. S. 533.

In *Heckman* v. *United States,* 224 U. S. 413, the court said:

> "But if the United States representing the owners of restricted lands, is entitled to bring a suit of this character, it must follow that the decree will bind not only the United States, but the Indians whom it represents in the litigation. This consequence is involved in the representation. (Citing authorities.) And it could not, consistently, with any principle, be tolerated that, after the United States, on behalf of its wards, had invoked the jurisdiction of its courts to cancel conveyances in violation of the restrictions prescribed by Congress, those wards should themselves be permitted to relitigate the question."

On the issues of fraud, conspiracy, invalidity and want of consideration, Phoenix, as well as the other bondholders, were represented by the trustees.

In the case of *Richter* v. *Jerome,* 123 U. S. 233, 246, the court said:

"Something is also said in the argument about the equitable claims of the bondholders upon Ayer as the successor of Anthony, growing out of the false representations made to them as to the title of the lands covered by the mortgage when they paid the money and took the bonds; but as all such claims come from the mortgage, as to which, in all proceedings for foreclosure, they are represented by their trustees when its interests are not in conflict with theirs, all the equities now asserted were proper subjects for adjudication in the former suit, if they existed. They formed part and parcel of the security which was then foreclosed."

Thompson and his associates controlled Phoenix and dominated and controlled the bridge company and were common directors of Phoenix and of the bridge company and he was a dominating influence and character therein (F.R. 188), and the burden was on complainants to show the fairness of the bond transactions and adequacy of consideration.

Geddes v. *Anaconda Copper Co.*, 254 U. S. 590.
Corsicana Natl. Bank v. *Johnson*, 251 U. S. 68.

The petition of intervention charged fraud and illegality and want of consideration, and it is well settled that where that appears in an issue or sale of bonds or coupons the mere possession of the paper under such circumstances is not sufficient. Proof must be offered as to actual considerations.

Thompson on Corporations, Vol. 3, sec. 2289, p. 216, at bottom p. 217, top p. 218.

Phoenix saw to it that it was well represented by the trustees. It filed exceptions (F.R. Supp. 14-58) setting forth in detail every claimed underlying and antecedent

debt as considerations for the bonds, which included every claimed consideration involved in the present Delaware actions and the mortgage involved herein; and it had the trustees in their exceptions adopt Phoenix' exceptions. Trustees' exception number two (F.R. Supp. 7) contained:

> "To avoid unnecessary duplication and consequent burden upon the court, complainant trustees do hereby expressly adopt each and every of the exceptions filed herein on behalf of Phoenix Finance Corporation to the same effect as if such exceptions were fully set forth," etc.

The trustees in their motion for dismissal and in the alternative petition for rehearing verified by Thompson, president of Phoenix, also adopted Phoenix' petition for rehearing and in the alternative for modification of decree (F.R. 214) wherein and in the affidavits thereto attached all the claimed underlying considerations were again asserted as considerations for the bonds and mortgage. (F.R. 216-391, especially 216, 223, 230, 236, 308, 340, 355 to 364.)

The trial court determined the questions of consideration presented in accordance with *Thomas* v. *Brownville, etc., R. Co.*, 109 U. S. 522.

In *Souffront* v. *La Compagnie Des Sucreries, etc.*, 217 U. S. 495, 54 L. ed. 856, 30 S. Ct. 608, 612, this court said:

> "The persons for whose benefit, to the knowledge of the court and of all parties to the record, litigation is being conducted, cannot, in a legal sense, be said to be strangers to the cause. The case is within the principle that one who prosecutes or defends a suit in the name of another, to establish and protect his own right, or who assists in the prosecu-

tion or defense of an action in aid of some interest of his own, and who does this openly, to the knowledge of the opposing party, is as much bound by the judgment, and as fully entitled to avail himself of it, as an estoppel against an adversary party as he would be if he had been a party to the record. *Lovejoy* v. *Murray*, 3 Wall. 1, 18 L. ed. 129."

See:

Anderson v. *Watt*, 138 U. S. 694, 704, 705.
Robbins v. *Chicago City*, 4 Wall. 657, 71 U. S. 657.
Lovejoy v. *Murray*, 3 Wall 1, 70 U. S. 1, 19.
Hoskins v. *Hotel Randolph Co.*, 203 Iowa 1152, 211 N. W. 423.
Fulsom v. *Quaker Oil & Gas Co.* (8 CCA), 35 Fed. (2) 84, 90.
Louisville & Nashville Ry. Co. v. *A. L. Schmidt*, 177 U. S. 230.
Stoddard v. *Thompson*, 31 Iowa 80, 82.
Schroeder v. *State Bank*, 144 Iowa 42.
Plumb v. *Crane, Adm'r, etc., supra*, 123 U. S. 560.

Phoenix was well represented. It was not only represented by the trustees, but through its president, Thompson, and associates, controlled the bridge company, defendant (F.R. 129). And on that ground the court made an order granting leave for the filing of petition of intervention by Kendrick on behalf of stockholders (F.R. 82, 85 to 86). Both the court and Master found that the bridge company was not making and would not have made a good faith defense to the complainant's action had not interveners intervened (F.R. 134 and 183).

Phoenix was made an ancillary party. The court having acquired jurisdiction between the original parties it appointed a receiver of all the property of the Iowa-Wisconsin Bridge Company and the property was in the

actual custody of the court (F.R. 68-72). That drew to it the right to decide all conflicting claims to its ultimate possession and control, all persons claiming to be entitled to participate therein might come in or be brought in under the jurisdiction acquired between the original parties ancillary to the original proceedings. At that Point the Phoenix was made a party (F.R. 85 to 88).

In *First Trust & Savings Bank* v. *Iowa-Wisconsin Bridge Company*, 98 Fed. (2) 416 at 421, cer. den. 305 U. S. 650, rehearing denied, 305 U. S. 676, the court in its opinion (F.R. 1689 at 1694 said:

> "Further, if the controversy between the two Delaware corporations should in any way be considered as a separate controversy involving only the validity of certain of the bonds, then it was ancillary to the foreclosure proceeding, and jurisdiction attached irrespective of citizenship, because the subject matter had been drawn into the federal court under the receivership before Phoenix became a party. (Cases cited.) The court did not err in overruling appellants' attack on the jurisdiction."

That ancillary parties are bound by the decrees and orders of the court is well established.

(c) The court had full and complete jurisdiction in equity to determine the matters involved in this cause.

The whole case was one of equitable cognizance. The equitable jurisdiction was invoked by the filing of the bill of foreclosure. An accounting was involved. It was referred to a Master by consent of the parties. Where a court of equity has obtained jurisdiction over some portion of a controversy, it has jurisdiction and

will proceed to decide the whole controversy and award complete relief, even where the rights of parties are strictly legal and the final remedy granted is of a kind that might have been conferred by a court of law.

All the matters covered by the court's injunction were fully litigated on the original hearing before the Master, before the court and on appeal before the Circuit Court of Appeals. Instead of presenting any such question as now claimed by Phoenix before the trial court, trustees and Phoenix presented the claimed considerations of Phoenix for bonds for adjudication and re-asserted them before the Circuit Court of Appeals. By failing to raise such question before the trial court it was waived, if it existed in the case, and it is too late now for Phoenix to raise such question in this ancillary proceeding for the first time in its petition for certiorari in the Supreme Court. It was never raised before, not even on the appeal from the final decree of injunction to the Circuit Court of Appeals. (Phoenix' statement of points on appeal R. 732-734; 115 Fed. (2) 1.)

Hartford Accident and Indemnity Co. v. *Southern Pac. R. R. Co.*, 273 U. S. 207.
Duignan v. *U. S.*, 274 U. S. 195.
Kilbourn, et al., v. *Sunderland, et al.*, 130 U. S. 505.
Perego v. *Dodge, et al.*, 163 U. S. 160.
People of Porto Rico v. *Livingston* (1 CCA), 47 Fed. (2) 712.
McGowan v. *Parish*, 237 U. S. 285.

The decision in the case of *Toucey* v. *New York Life Insurance Co.* (8 CCA), 102 Fed. (2) 16, cited by petitioner, is not against, but on the contrary supports the above proposition.

In *Armour & Co.* v. *Miller* (8 CCA), 91 Fed. (2) 521, the court said:

> "It is, of course, well settled that a court of equity having acquired jurisdiction of the subject-matter of a suit will retain such jurisdiction for all purposes, and adjudicate all disputed rights of the parties arising out of such subject-matter, and this too, notwithstanding some of such rights may sound at law (citing authorities and equity rules); indeed it is its duty to do so, and 'not remit any part of (the controversy) to a court of law' (citing authorities). And in cases such as the suit of Storley, damages may be adjudged down to the date of the trial."

Code Section 12372 of the Code of Iowa of 1931, 1935 and 1939 provides:

> "Equitable Proceedings. No deed of trust or mortgage of real estate shall be foreclosed in any other manner than by action in court by equitable proceedings."

Code Section 12373 of the Code of Iowa of 1931, 1935 and 1939 provides:

> "Deeds of Trust. Deeds of trust of real property may be executed as securities for the performance of contracts, and shall be considered as, and foreclosed like, mortgages."

In *Deaton* v. *Hollingshead,* 225 Iowa 967, 282 N. W. 329, the court, in discussing the nature of a foreclosure action, said:

> "Code Section 12372 provides that a mortgage of real estate shall be foreclosed by equitable proceedings. Plaintiff in the foreclosure suit selected the equity forum for the adjudication of his rights and

> prayed, not only for a money judgment, but also for foreclosure of the mortgage and appointment of a receiver. The court of equity had jurisdiction of the controversy and parties, and the action having been properly brought in equity, all issues, *legal and equitable,* are triable therein, and the court will determine the entire controversy." (Emphasis supplied.)

Petitioner's statement in its brief, bottom page 74, top page 75, is a misstatement of the record. Respondent's supplemental and ancillary bill below (R. 3) contained such statement and the District Court's finding number four on preliminary injunction (R. 121) contained such statement, but such statement was limited and confined by the court's finding number nine, paragraph (f) (R. 127), in which he excepted therefrom the "toll ticket case" pending in Delaware and defenses thereto. In the court's findings on permanent injunction that finding was eliminated, and the court in its finding number four on permanent injunction found that on the first day of December, 1936, the court filed its opinion, findings of fact and final decree, which was made a part of the record (R. 705). And also in its finding number nine, paragraph (f), excepted the "toll ticket case" (R. 711). And excepted the toll ticket case from its conclusions of law (R. 714). And in its final decree did not enjoin that case (R. 719-722).

Phoenix was already represented in the lawsuit by the trustees with all the pleadings applying. It filed answer to the petition of intervention and all the pleadings applied to it, and it cannot now assail collaterally the decrees and orders made on a question of pleading.

> *Corcoran* v. *Chesapeake & Ohio Canal Co.,* 4 Otto 741, 24 L. ed. 190.

Himes v. *Smith* (6 CCA), 270 Fed. 132, cert. den. 255 U. S. 576.
Davis v. *Zirkle*, 80 Ind. A. 396, 138 N. E. 266.
Nome & Snook v. *Ames Merc. Co.* (9 CCA), 187 Fed. 928.
Crary v. *Kurtz*, 132 Ia. 105, 107, 105 N. W. 590.
Bell v. *Corbin*, 136 Ind. 269, 36 N. E. 23.
Louisville, etc., Const. Co. v. *Utz*, 133 Ind. 265, 32 N. E. 881.
34 Corpus Juris, Sec. 1410, p. 993.

(d) All the controversies involved in the supplemental and ancillary bill were within the issues. All such matters were controverted and litigated.

The case of *Reynolds, et al.* v. *Stockton*, 140 U. S. 254, cited by petitioner, bears no similarity to the instant case. The case is similar to the class of cases where the plaintiff by his notice and pleadings asks for certain relief, and then on default or after answer, without further legal notice and without amendment, takes judgment based on different grounds than those alleged and for a wholly different amount in the absence of the defendant. The court in the opinion states:

> "Nor are we concerned with the question as to the rule which obtains in a case in which, while the matter determined was not, in fact, put in issue by the pleadings, it is apparent from the record that the defeated party was present at the trial and actually litigated that matter. • • • Here there was no appearance after the filing of the answer and no participation in the trial or other proceedings."

The case of *Union Central Life Ins. Co.* v. *Drake*, 214 Fed. 536, cited by petitioner, supports the position of respondent. The language quoted by petitioner refers to situations where the *second suit* is upon a different cause

of action and the sentence quoted, standing alone, is not a correct summary of the decision. The court says in the following sentence:

> "Moreover, the test of identity of causes of action is the identity of the facts essential to maintain them."

In the foreclosure action, in view of the defense of want of consideration for the bonds, it was indispensable to the maintenance of the suit of complainants that they establish consideration. In the Delaware suits (without reference to the defense of *res judicata*) proof of consideration is indispensable to a right of recovery.

Courts are not limited to the pleadings and the decree in order to determine the issues of a former case and the effect of the adjudication thereof.

> Freeman on Judgments (5th Ed.), Vol. 2, Sec. 765, pp. 1618, 1620.
> Freeman on Judgments (5th Ed.), Vol. 2, Sec. 769, p. 1630 and Sec. 771, p. 1638.
> 34 Corpus Juris, Sec. 1329, p. 921.

State of Oklahoma v. *State of Texas*, 256 U. S. 70, 88, in which the court said:

> "What was involved and determined in the former suit is to be tested by an examination of the record and proceedings therein, including the pleadings, the evidence submitted, the respective contentions of the parties and the findings and opinion of the court."

Also see:

> *National, etc., Co.* v. *Oconto*, 183 U. S. 216.
> *Sampson* v. *Jump*, 188 Iowa 528, 175 N. W. 318.

Millie Mining Co. v. *McKennie* (6 CCA), 172 Fed. 42.
Loeb v. *Columbia Township Trustees*, 179 U. U. 472, 481.

"Where the judgment or decree in a case has been reviewed on appeal or the decision or judgment of an appellate court is relied upon as *res judicata*, the opinion of the court and the record in the case may be examined to determine what was adjudicated, and whether the adjudication was on the merits. A bill of exceptions or statement for purposes of appeal may be looked to."

Freeman on Judgments (5th Ed.), Vol. 2, Sec. 772, p. 1642.

(e) Doctrine of *res judicata* does not depend upon affirmance and denial of a particular proposition in the pleadings of the former suit, but on the fact that the proposition has been fully and finally investigated and tried.

In *King City, Mo., for use and benefit of United States Cast Iron Pipe and Foundry Co.* v. *Southern Surety Company* (Sept. 29, 1931), 212 Iowa 1230, 238 N. W. 93, wherein the federal court had entered judgment denying material man's recovery on contractor's bond, it was held *res judicata* of a suit by city for benefit of material man to recover on same bond and of legal issues as to effect of bond as well as equitable issues regarding reformation of bond. The court said:

"This court is committed to the doctrine that *res adjudicata* does not rest upon the fact that a particular proposition has been affirmed and denied in the pleadings of the former suit, but upon the fact that it has been fully and fairly investigated and

tried therein. See *Reynolds* v. *Lyon County,* 121 Iowa 733, 96 N. W. 1096, 1099. We there said: 'The prevailing rule is so well expressed in Black on Judgments No. 614, that we quote with approval: "The doctrine of *res judicata* does not rest upon the fact that a particular proposition has been affirmed and denied in the pleadings, but upon the fact that it has been fully and fairly investigated and tried; that the parties have had an adequate opportunity to say and prove all that they can in relation to it; that the minds of court and jury have been brought to bear upon it, and so it has been solemnly and finally adjudicated. Now, these conditions are fully met when any question, though foreign to the original issue, becomes the decisive question—the turning point—in the case. In that event it will receive just as full and exhaustive an examination as if it were the sole subject-matter of a distinct and independent suit, and therefore should be considered as much settled by the judgment as if it stood alone as the issue in the case. For these reasons, the more correct doctrine is that the estoppel covers the point which was actually litigated, and which actually determined the verdict of (or) finding, whether it was statedly and technically in issue or not." ' (Citing authority.)

"Matters which follow by necessary and inevitable inference from the judgment-findings or determinations of the court, in relation to the subject-matter of the suit which are necessarily implied from its final decision, as being determinations which it must have made in order to justify the judgment as rendered—are equally covered by the estoppel as if they were specifically found in so many words. See 34 C. J. 923.

"Applying the foregoing rules to the proposition confronting us, it seems quite clear that the plaintiff is estopped from maintaining the action now at-

tempted to be litigated, by the former adjudication of the federal court."

(f) The rule of the national courts and of the courts of Iowa as to what constitutes *res judicata* are the same.

Petitioner cites *Baltimore Ship Co.* v. *Phillips*, 274 U. S. 316. In that case the court said:

> "If upon the *same cause of action*, the judgment or decree upon the merits in the first case is an absolute bar to the subsequent action or suit *between the same parties or those in privity with them*, not only in respect of every matter which was actually offered and received to sustain the demand, but also as to every ground of recovery which might have been presented. But if the second case be upon a different cause of action the prior judgment or decree operates as an estoppel only as to matters actually in issue or *points controverted*, upon the determination of which the judgment or decree was rendered." (Emphasis supplied.)

The case of *Southern Pacific Ry. Co.* v. *U. S.*, 168 U. S. 1, cited by petitioner, holds nothing contrary to the position of respondent, but on the contrary fully supports its position, and there should be added to petitioner's quotation therefrom:

> "and, even if the second suit is for a different cause of action, *the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established*, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination.

> Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect to all matters properly put in issue, and actually determined by them."

In that case the court also said:

> "A judgment upon the merits constitutes an absolute bar to a subsequent suit upon the same cause of action *in respect to every matter offered and received in evidence or which might have been offered to sustain or defeat the claim in controversy.*" (Emphasis supplied.)

The other cases of the United States Supreme Court cited by petitioner also support respondent's position when complete statement therein contained is read in connection with the portion quoted by petitioner.

Also see:

Werlein v. *New Orleans,* 177 U. S. 390, 397, 20 S. Ct. 682, 685, 44 L. ed. 817.
Chicot County Drainage Dist. v. *Baxter State Bank,* 308 U. S. 371, 378.
Davis v. *Brown,* 94 U. S. 423.
Cromwell v. *County of Sac,* 94 U. S. 351.
Cornett v. *Williams,* 20 Wall. 226.
Spencer v. *Watkins* (8 CCA), 169 Fed. 378, cert. den. 215 U. S. 605.

In *Bagley* v. *Bates,* 223 Iowa 836, 273 N. W. 924, at 927, the court said:

> "It is the general rule of law that 'a judgment on the merits rendered in a former suit between the same parties or their privies, on the same cause of

action, by a court of competent jurisdiction, operates as an estoppel not only as to every matter which was offered and received to sustain or defeat the claim, but as to every *other matter which might with propriety have been litigated and determined in that action.* • • •

This is a well-established rule, of almost universal application, that a judgment, if rendered by a court of competent jurisdiction, on the merits, constitutes a complete bar and estoppel to a subsequent action between the same identical parties based upon the same claim or demand or cause of action. *This is not only true with reference to matters in issue, but it is true as to all matters incident to or essentially connected with the subject of the action which might have been put in issue and adjudicated.* This rule is so familiar it needs no citation of authorities to sustain it." (Emphasized in opinion.)

Also see *Rew* v. *School District*, 125 Iowa 28, 98 N. W. 802.

(g) A mortgage or deed of trust or pledge cannot exist without a pre-existing debt.

As said in Jones on Mortgages, 8th Ed., Sec. 316, at page 289:

"A debt, either pre-existing or created at the time, or contracted to be created, is an essential requisite of a mortgage. 'A mortgage is, in equity, a hypothecation or pledge of property for the security of a debt. There must be a debt, or there can be no security for its payment. Hence it is said, if there is no debt, there can be no mortgage. Debt, in this connection, means a duty or obligation to pay, for the enforcement of which an action will lie.'"

And in *Carpenter* v. *Longan*, 16 Wall. 271, it is said:

> "Upon bill of foreclosure * * * an account must be taken to ascertain the amount due upon the instrument secured by the mortgage. * * * The note and mortgage are inseparable; the former as essential, the latter as an incident. * * * The mortgage can have no separate existence. When the note is paid the mortgage expires. It cannot survive for a moment the debt which the note represents."

See also:

Ariz. Copper Estate v. *Watts*, 237 F. 585.
Holladay v. *Willis*, 101 Va. 274, 43 S. E. 616.
Saunder v. *Dunn*, 175 Mass. 164, 55 N. E. 893.

The proposition finds another analogy in the law of pledges, which is that there can be no valid pledge of property unless there is a valid debt in existence which is to be secured by the pledged property. If there is no such valid debt then the pledge is invalid.

49 C. J., page 903, sec. 23 (Failure of Consideration).
Chapman v. *Sipe Springs First Nat. Bank*, 275 S. W. 498 (Tex.).
Stokes v. *Stokes*, 155 N. Y. 581, 50 N. E. 342.

The case of *Thomas* v. *Brownsville, etc., R. Co.*, 109 U. S. 522, is in point. In that case an action was filed for the foreclosure of an Indenture of Mortgage securing a bond issue. The bonds themselves were issued on account of a contract for the construction of the railroad. The court found as a fact that the bonds were invalid because the construction contract was fraudulent and therefore void. However, some of the bonds were held to be valid to the extent they could be supported by consideration, resulting from work, labor, and material fur-

nished by the contracting company. But the court pointed out that such partial validity of the bonds was not dependent upon the original obligation—the contract which had been declared void.

The case illustrates the fact that in a suit to foreclose a mortgage securing a bond issue the court may inquire into the consideration for the bonds, and will, if necessary, void the bonds if they are issued on account of void obligations. Necessarily in the Thomas case the court had to determine the validity of the underlying obligation.

(h) Successful defense to action on collateral bars an action on the debt.

The rule is stated as follows in 34 C. J., p. 953:

> "A successful defense on the merits in an action either on the principal debt or the collateral will bar an action on the other."

In support of this are cited, among other cases, *Johnson* v. *Forstall, et al.*, 3 La. Ann. 466, and *Sykes* v. *Gerber*, 98 Penn. Stat. 179.

In the last cited case there had been a suit on a promissory note, with judgment for defendant. An action was then commenced on the original debt. The court assumes that the note had not been given in payment of the debt but as security. The opinion then states:

> "The original claim and the note were by the same parties, for the same consideration and payment of either would have satisfied both. A judgment in favor of the creditor upon either would be a bar to a recovery on the other. And a judgment for the debtor in an action which finally disposed of the note for equally good reason is a complete defense

against a suit upon the account or claim which the note represented."

The situation as to the purported notes involved in the Delaware actions is exactly parallel. The $20,100.00 bonds were given as security for certain notes. There was and could be no consideration for them except the alleged indebtedness represented by the notes. When the court found that there was no consideration for the bonds, it necessarily found that there was no valid indebtedness and therefore no consideration for the notes representing the purported indebtedness.

The rule stated as quoted above from Corpus Juris is fully sustained by the Supreme Court of the United States in *Chew* v. *Brumagen*, 13 Wall. 497, 20 L. Ed. 663, in which the converse situation existed, *i. e.*, the original action was on the indebtedness and the second action an attempt to foreclose the mortgage. This case is also valuable authority on the proposition that where a trustee of an express trust brings an action the *cestui que trust* is bound by that judgment not only in the state where the judgment was rendered, but in all other states.

In that case a bond for $3,500.00 was secured by a mortgage. The bond was assigned by the obligee to another, who brought suit on it in the State of New York. A defense of fraud was interposed. A verdict was returned for the plaintiff, but for only $2,091.25. Judgment was entered for this amount and paid by the maker of the bond. The bond and mortgage were then assigned to a third party who attempted to foreclose the mortgage in the State of New Jersey. The mortgagor set up in defense the previous suit on the bond in New York, the judgment and the payment of the judgment, claiming that

the debt which the mortgage was given to secure was thereby satisfied, and consequently that the mortgage was satisfied. His plea of *res judicata* was rejected by the courts of New Jersey and an appeal taken to the Supreme Court of the United States.

With reference to the right of the trustee to sue, he being the only indispensable party, and as to a judgment in an action by him being binding upon his *cestui que trust*, the court cited the statute of the State of New York, which is practically identical to Code of Iowa 1935, Section 10968, cited by the Circuit Court of Appeals in this case, and held that neither the *cestui que trust* nor his personal representative was a necessary party to the suit brought upon the bond by the trustee. The court said:

> "They were represented by the trustee, and the judgment which he recovered settled finally against them, and claiming under them, as well as against Wood (the trustee) the amount recoverable."

The court further held that the judgment in the original suit determined finally the amount of the debt for which the bond was given and neither the *cestui que trust* nor his administratrix nor any subsequent assignee of either of them could maintain that the bond was not wholly extinguished in the judgment.

Also see *U. S.* v. *California & Oregon Land Co.*, 192 U. S. 355, 24 S. Ct. 266.

> *Beloit* v. *Morgan*, 7 Wall. 619, 19 L. ed. 205.
> *Thompson* v. *Roberts Bros.*, 24 How. 233.

In *Kenyon* v. *Wilson*, *The Same* v. *Baker*, 78 Iowa 408, the court said:

"The petitions in these cases are substantially alike. They allege that one Tramel, to secure a promissory note held by plaintiff, executed a chattel mortgage upon fifty steers, which was foreclosed in an action against Tramel, in which a personal judgment was entered against him, as well as a decree foreclosing the mortgage against defendants in these cases. It is alleged that each of the defendants, after the registry of the mortgage, had purchased portions of the cattle from the mortgagor. The decree of foreclosure contains no judgment against defendants, but directs that a special execution shall issue against all of the property mortgaged. But the defendants have disposed of the cattle held by them, converting the property to their own use. The defendant in each case pleads that the matters upon which plaintiff bases his claims against them are *res judicata*, having been involved in the original foreclosure proceedings.

"It is plain that the identical relief—a personal judgment against defendant—sought in these actions could have been recovered in the original foreclosure proceeding. * * *

"An adjudication is final and conclusive of all matters in a case which the parties could have presented to the court for adjudication in the case. The law hates a multiplicity of suits, and will not permit a plaintiff to split up his demands, presenting one at a time, in separate successive actions. He must litigate all matters growing out of his causes of action upon which a remedy may be sought in one action. *Thus he cannot seek a foreclosure of a mortgage in one action, and in a subsequent action ask for a personal judgment against the defendant. He could have recovered both remedies in the first action, and must be content with what he first recovers.*"

Also see *Schroeder* v. *Bank*, 144 Iowa 42.

(i) Petitioner's assertion that decisions of District Court and of the Circuit Court of Appeals are erroneous, in that indebtedness of Phoenix to bridge company could not be offset against bonds, is without merit.

It should be a sufficient answer to say that appellants having litigated the question of consideration for the bonds and the court having jurisdiction of the subject matter and of the parties any claimed error in the decision could only be reviewed on appeal, and that unless modified on appeal the decision is final, even if it were erroneous. 34 C. J., p. 901, Section 1311.

American Express Co. v. *Mullens*, 212 U. S. 311, 29 S. Ct. 381.
Last v. *Woolworth*, 150 U. S. 401.

Petitioner on former appeal claimed that the decree was "broader than the pleadings and issues" (Assignment of error 59, F.R. 256).

However, the trial court and the Circuit Court properly considered the matter of Phoenix' indebtedness to the bridge company and determined whether there was any consideration of any kind for the notes, the Kramer & Hogg item of $9,000 and the bonds in question.

John A. Thompson, president of the Phoenix Finance Corporation, was also president of the bridge company, and he and other directors of Phoenix Finance Corporation, who were also directors of the bridge company, controlled and dominated the bridge company (F.R. 188), and at the time of the alleged payments and the execution of the alleged notes and at the time of the delivery of the bonds, they were in duty bound merely to credit any payments claimed to have been made by Phoenix to or for

the bridge company on the amount due the bridge company from Phoenix.

The relation of directors to corporations is of such a fiduciary nature that transactions between corporations having common directors are regarded as zealously by the law as are personal dealings between a director and his corporation, and where such transactions are challenged, the burden is upon those who would maintain them to show their entire fairness and where a sale is involved, *the adequacy of consideration. Especially is this true where a common director is a dominating influence or character* (*as the court found here*) (F.R. 188).

The Supreme Court of the United States, in *Geddes* v. *Anaconda Copper Mining Co.*, 254 U. S. 590, said:

> "This court has been consistently emphatic in the application of this rule, which it has declared is founded in the soundest morality, and we now add the soundest business policy."

Such transactions are presumptively fraudulent.

Thompson and his controlled Phoenix, dominating and controlling the bridge company, owed a fiduciary duty to the bridge company, in the performance of which the law forbade them to take any notes and then bonds as collateral thereto for any payments claimed to have been made by Phoenix to the bridge company or for it while Phoenix was indebted to the bridge company in a far greater amount, and having acted in a dual capacity the notes and bonds were presumptively fraudulent.

In Vol. 3, Thompson on Corp., pp. 217, 218, Sec. 2289, it is said:

"But the rule is also well settled that where, under proper pleadings, fraud or illegality in the issue or sale of such bonds or coupons has been shown, then the holder or indorsee, before he is entitled to recover, must prove that he is a holder for value; *and the mere possession of the paper* under such circumstances is *not sufficient.* The reason of this rule is that the proof that the instrument was unlawful or fraudulently issued overcomes the presumption of the *good faith* on the part of the holder, and then casts upon him the *burden* of proving that he was a purchaser for value before maturity and without notice of any defense * * *."

Full inquiry and examination was made by the court as to the claimed underlying considerations of the notes, said $9,000.00 item and the bonds in question. All the evidence bearing thereon was presented and analyzed in detail, and from it the court found that there in fact was no consideration for the notes nor for the $9,000.00 Kramer & Hogg item, nor for the bonds; that Phoenix in fact at the time of the payments claimed as consideration therefor was indebted to the bridge company in a far greater amount; $14,000.00 represented by stock turned over to Phoenix on the fraudulent guaranty contract, the Wilder items, the Thompson commissions and the Thompson worthless notes and other items and that in law any payments made by it were merely a partial payment of the indebtedness to the bridge company and that no consideration existed for the above items (F.R., 156-204, especially 177 and 204).

Such matters could be considered as defensive and it was not necessary that they be pleaded. The petition of intervention was sufficient for that purpose and the items have been fully litigated.

In 57 C. J., p. 389, Sec. 40:

> "Although the matter could not be interposed as a set-off because no action could be maintained thereon it may still be available by way of defense."

In 49 C. J., p. 310, Sec. 380:

> "Where matter relied upon is strictly a defense in whole or in part to plaintiff's cause of action, it need not be set up as a cross demand."

Want of consideration was involved. *The question was not as to whether any consideration had passed from the trustees to the bridge company, but whether any consideration had passed from Phoenix to the bridge company*, and, therefore, it was necessary in determining that question to determine whether at the time the notes were given and the Kramer & Hogg item claimed to have been paid and at the time the bonds were issued, there was, in fact, any indebtedness from the bridge company to Phoenix. It was not claimed in this case that there was any consideration from the trustees but the trustees and Phoenix, defendant to the petition of intervention, claimed that there were considerations from Phoenix to the bridge company. Insofar as the bonds and their claimed underlying considerations were concerned, the defense was that even if Phoenix paid any items to or for the bridge company, nevertheless, on the other hand, prior to the payment of any such items, Phoenix had become indebted to the bridge company in a sum far in excess of the amounts of the claimed underlying considerations of the notes and of any other item paid by Phoenix to or for the bridge company and that, therefore, in fact, when the notes were given, there was no actual consideration owing to Phoenix which would stand as a consideration for the

notes, or for the bonds issued as collateral to them, nor as consideration for any of the other bonds issued to the Phoenix.

The case was before a court of equity. The intervener, appearing for the defendant, as a part of its prayer, had asked for general equitable relief. A similar prayer had been made by trustees and Phoenix; a court of equity, or a court possessing equitable jurisdiction, has inherent power as a part of its general jurisdiction to allow or compel a set-off independent of statute. 57 C. J. 361; *Scott* v. *Armstrong*, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059. The right to set-off, formerly regarded as attaching to the remedy only and not to the debt itself, is now recognized, particularly by the federal courts, as a matter of substantive justice affecting substantive relations between the parties. *The Gloria*, 286 Fed. 188, 192; Questions of CCA answered 266 U. S. 328, 45 S. Ct. 112, 69 L. Ed. 313.

In the federal courts set-off is not confined to matters arising out of the contract or transaction sued on. *Central Appliance Co.* v. *Buchanan* (CCA 6th), 90 Fed. 454 (opinion by Judge Lurton, concurred in by Judge Taft).

It would be impossible in any case, and so it was here, to determine the question of consideration for bonds without considering the relations between the defendant and the parties to whom the bonds had been issued.

The rule in Delaware and other states as to the necessity of affirmatively pleading set-off has no application to equitable action in the federal courts and particularly so when the set-off is treated as a defense.

In concluding this point of our brief it is perhaps advisable to refer briefly to the cases cited by appellant on pages 66-67 of its brief. To take these cases up one by one would serve no purpose; it suffices to say that they have no bearing upon the case at bar. Despite the statement of counsel for appellant that set-off must be pleaded in equity to be availed of as a defense, no case has been cited so holding. Appellant's counsel in citing Woolley on Delaware Practice and other authorities seems to have lost sight of the fact that the bridge case in Iowa was an action in equity and not at law. These authorities may, therefore, be dismissed without comment as not at all pertinent.

(j) The Delaware Superior Court erred in undertaking to review the findings of the federal court and its conclusions were erroneous.

Petitioner refers to the opinion of the trial court in the Delaware action involving the $3125 and the $2000 notes. This was filed after the trial and submission of the hearing on permanent injunction herein and the federal court's order approving supersedeas bond as modified provides that the petitioner is to dismiss that and other actions and to satisfy any judgment rendered therein if the instant case is affirmed. The question here involved is the federal court's findings and final decree and the correctness thereof. The decision of the Superior Court of Delaware at the time of the submission of this cause was not in existence, and is not a part of this record.

The learned Delaware court, in its opinion, referring to the $3,125 note, which the Master allowed, states:

> "This conclusion of the validity of the note was not changed by the decree of the court overruling the master upon this point."

The federal trial court held:

> "This conclusion of law is attacked in the defendants' and interveners' eighth exception. I think that insofar as the language of the master's conclusion includes the $9,000 of bonds held valid in the hands of Phoenix Finance Corporation and the $3,125 in bonds held valid in the hands of Phoenix Finance Corporation, it is erroneous" (F.R. 177-178).

and the court in its decree held:

> "that all bonds are without valid consideration with the exception,"

then specifying $15,000 of bonds held by others (F.R., 203-204).

The Delaware court then makes a statement at variance with the federal trial court's findings numbers 8 and 41 (F.R. 185 and 202), that Phoenix Finance Corporation was the successor in interest of the Phoenix Finance System, Inc., and subject to all defenses and offsets to which said Phoenix Finance System was at any time subject. We contend the Delaware court was in error in undertaking to review the federal court's findings.

The Delaware court erred in its statement:

> "In this case we are not directly concerned with the question as to whether the representation of a bondholder by a trustee includes an inquiry as to the validity of the bonds themselves, or at what stage of the proceeding such inquiry should be had. No

such question is here presented, for we are in no way interested in the bonds, as such" (App. Br., p. 53).

The judge writing the opinion then states that the conclusion in the court's opinion is not inconsistent with *Kerrison* v. *Stewart, supra; Mercantile Trust Co.* v. *Schafely, supra; Richter* v. *Jerome, supra; Beals* v. *Illinois & C. R. R. Co., supra,* or *Elwell* v. *Fosdick, supra.*

That the Delaware court wholly misconstrued those decisions and others of this court cited herein, in the light of the provisions of sections 10 and 13 of the trust indenture, heretofore quoted, is apparent from an examination of the authorities cited. And it is apparent that they overlooked the decision of the circuit court in *Lane* v. *Equitable Trust Co. of N. Y.* (8 CCA), 262 Fed. 918.

The Delaware court, in its opinion, states:

> "When, however, the sole matter before the adjudicating tribunal relates to the collateral itself and not to the antecedent debt, and the only parties before the court are connected with the collateral, and not with the antecedent debt, we think the principle fails of application and the invalidity of the collateral does not necessarily destroy the validity of the underlying indebtedness."

But the record shows that the parties before the court were not only connected with the collateral but also with the claimed antecedent debt. There could be no basis for the collateral without the claimed antecedent debt. The claimed underlying consideration of the notes was directly urged upon the trial court and this court as a consideration for the bonds in Phoenix' exception number 6 (Phoenix' exception No. 6, F.R., Supp., pp. 48-49).

The learned Delaware Superior Court, instead of giving full credit and effect to the decisions of the United States District Court and of the Eighth Circuit Court of Appeals in its decision proceeded to state conclusions of its own as to the facts determined by such decisions.

In *Deposit Bank of Frankfort, plff. in error* v. *Board of Councilmen of the City of Frankfort,* 191 U. S. 499, this court said:

> "* * * The doctrine of estoppel by judgment is founded upon the proposition that all controversies and contentions involved are set at rest by a judgment or decree lawfully rendered, *which, in its terms, embodied a settlement of the rights of the parties.* It would undermine the foundation of the principle upon which it is based if the court might inquire into and reverse the reasons which led the court to make the judgment. In such case nothing would be set at rest by the decree, but the matter supposed to be finally adjudicated, and concerning which the parties had had their day in court, could be reopened and examined, and if the reasons stated were, in the judgment of the court before which the estoppel is pleaded, insufficient, a new judgment could be rendered because of these divergent views, and the whole matter would be at large. In other words, nothing would be settled, and the judgment, unreversed, instead of having the effect of forever settling the rights of the parties, would be but an idle ceremony. We are unable to find reason or authority supporting the proposition that, because a judgment may have been given for wrong reasons, or has been subsequently reversed, it is any the less effective as an estoppel between the parties while in force." (Emphasis supplied.)

Also see:

> Opinion of Judge Geo. C. Scott on hearing on permanent injunction (R. 718).

The cases and authorities cited by petitioner at pages 80-83 of its brief with reference to jurisdiction of the Delaware court in matters involving internal affairs of the bridge company, are, we submit, wholly irrelevant. The Delaware statute cited, page 81, simply deals with the status of ownership of capital stock of Delaware corporations for purposes of title, action, attachment, garnishment and jurisdiction "*of all courts held in this state,*" and in no manner supports petitioner's contention.

Jurisdiction of a foreign corporation having attached by proper service, the question of whether relief relating to such corporations' internal affairs should be granted, is in no proper sense jurisdictional, but is one of discretion in the exercise of the jurisdiction determined by considerations of convenience, expediency, efficacy and justice.

> See Fletcher Cyc. Corp. (Perm. Ed.), Vol. 17, Sec. 8427, p. 376.
> *American Creosote Co.* v. *Powell,* 298 Fed. 417, certiorari denied 265 U. S. 595.

When a corporation is sued it has a right to defend the suit on all proper grounds.

> See Fletcher Cyc. Corp., Vol. 18, Sec. 8672, p. 242.

In *Burnrite Coal Briquette Co.* v. *Riggs, et al.,* 274 U. S. 208, the court said:

> "According to the supposed exception, a party who has acquiesced and has thereby joined in mis-

leading the court into an erroneous exercise of jurisdiction, may not complain when he is thereafter saddled with the charges. And he will be held to have acquiesced, despite challenge of the jurisdiction, if his challenge was placed wholly upon an untenable ground; for, by objecting only on the untenable ground, he may have misled the court as much as if he had not objected at all."

Now, we have the spectacle of Phoenix trying to reach back into the record of the former trial and to inject into it a question of internal management of the bridge company after the cause has been tried, determined and the decision affirmed. Of course, they do not cite any decision in support of this contention. It is so ridiculous that there can be no decision in support of it.

In any case where one corporation sues another, who may raise the question of internal management of the defendant corporation being involved? Is it the defendant that is being sued, or may the plaintiff corporation reach over on the defense side to raise the question?

No question of the internal managment was involved in this case, nor is any question of internal management involved in the Delaware case enjoined, and so obviously it can have no bearing on the question of *res judicata.*

Furthermore, there is no proper question of internal management presented. Petitioner in this case sought the return of stock which it had used in its fraudulent enterprise, and it is now seeking to recover the same stock in the Delaware action because it failed in that enterprise. In this case it sought to recover on the basis of a claimed individual right as against the corporation alone as a defendant, and it is seeking to do the same thing in the enjoined Delaware action. It involves no question of inter-

nal management because in each instance all that was attempted to be asserted and all that is attempted to be asserted is an individual right; just like any other claim that may be asserted against a corporation in any court having jurisdiction of the parties. The Phoenix' position is no different than if a stranger were suing for the return of stock which he had used in perpetrating a fraud on the corporation.

In Fletcher Cyc. Corp., Vol. 17, Sec. 8429, pp. 385-387:

> "Where, however, the acts of the foreign corporation complained of affect the complainant's individual rights only, then our courts will take jurisdiction wherever the cause of action arises."

Aso see *La Varre* v. *Hall,* 42 Fed. (2) 65.

To say that the perpetration of a fraud upon a corporation by obtaining from it bonds in exchange for shares of stock is such a matter of internal management that a court dealing with the entire fraudulent conspiracy, of which the particular fraud was but a part, and in the accomplishment of the attempted result of which the particular fraud was a step, is too shocking for consideration.

The court will note that counsel for petitioner studiously refrain from referring to the *findings of fraud,* to which reference has just been made, but confine themselves entirely to the findings of a violation of the corporate charter and of the Delaware statutes.

The facts with reference to this transaction are set out in the citations in support of *Finding* 9-b, *supra,* pp. 104-110. This stock consisted of 40 shares bought by

Thompson & Co. in the name of Thompson and 477 shares of stock that Thompson & Co., subsidiary of Phoenix Finance System, Inc., bought from Shaffer & Company. Thompson induced his controlled board of directors to exchange the stock for bonds. The transaction was not merely illegal but fraudulent, part and parcel of a fraudulent conspiracy.

(a) It was in violation of the Delaware statute under which the the bridge company was incorporated (Section 19, Article 1, General Corporation Laws of Delaware, F.R. 186).

(b) It was in direct violation of the bridge company's charter with respect to a redemption of preferred stock (F.R. 1496).

(c) It was an actual fraud against the bridge company as a corporation in that it was intended by Thompson and his associates to illegally and fraudulently change the stock liability into an indebtedness purported to be secured by the fraudulent trust deed on all the property of the corporation.

(d) It was also a fraud on the other holders of Class A stock of the corporation, of which there were a large number, who were not notified of the proposed transaction and were not given any opportunity to participate in exchange of Class A stock for bonds.

This was asserted in the petition of intervention as amended and also alleged in answer to the petition for rehearing (F.R. 398).

The 517 shares of stock were surrendered or turned over to the bridge company as a part of a fraudulent scheme, plan and conspiracy and the $60,500.00 of bonds

were fraudulently issued as a part and parcel of such fraudulent conspiracy. In furtherance of such conspiracy letters and notices were sent through the United States mail to stockholders containing false and fraudulent statements for the purpose of procuring proxies and inducing them to vote for the bond issue at the meeting called for that purpose, which was in violation of Section 215 of the Federal Penal Code (F.R. 795, 591-2, 612, 1655; see especially Exhibit G. A. B. 5, F.R. 1605, G. A. B. 6, F.R. 1607, G. A. B. 8, F.R. 1609, G. A. B. 9, F.R. 611, testimony of G. C. Ditmann, F.R. 654).

Then in furtherance of the conspiracy, John A. Thompson, and his associates, conspiring and confederating together, held a stockholders' meeting on December 22, 1932 (F.R. 951-954), pursuant to the fraudulent statements and representations contained in said letters and at that meeting like fraudulent statements were orally made by John A. Thompson and incorporated in the resolutions authorizing the bond issue which were passed. Then with intent to cheat and defraud the Iowa-Wisconsin Bridge Company, a directors' meeting was held and through Thompson's control, resolutions passed to exchange the bonds for stock (F.R. 973-978), which contained false statements, and the bonds thereafter turned over to Phoenix Finance Corporation as a part of said conspiracy on the pretense that it was entitled thereto, all in violation of the criminal statutes of Iowa.

Iowa Code, 1935, Sec. 13045, provides:

> "If any person designedly or by false pretense or by any privy or false token and with intent to defraud, obtain from another any money, goods, or other property, or so obtain the signature of any person to any written instrument, the false making

> of which would be punished as forgery, he shall be imprisoned in the penitentiary not more than seven years or be fined not exceeding $500.00, or be imprisoned in the county jail not exceeding one year, or be punished by both such fine and imprisonment."

Section 13162, Code of Iowa, 1924, provides:

> "If any two or more persons conspire or confederate together with the fraudulent or malicious intent wrongfully to injure the person, character, business, property, or rights in property of another, or do any illegal act injurious to the public trade, health, morals, or police, or to the administration of public justice, or to commit any felony, they are guilty of a conspiracy, and every such offender, and every person who is convicted of a conspiracy at common law shall be imprisoned in the penitentiary not more than three years."

The transaction, therefore, not only was an *ultra vires* transaction, but illegal, fraudulent and contrary to public policy.

The distinction between *mala in se* and *mala prohibita* has been abandoned, but, were this otherwise, there is authority for regarding as *malum in se* any act which is fraudulent, contravening public policy and a penal statute.

> *Irwin* v. *Curie*, 171 N. Y. 409, 64 N. E. 161.
> *Gibbs* v. *Consolidated Gas Co.*, 130 U. S. 396.
> *McMullen* v. *Hoffman*, 174 U. S. 639.
> *Equitable Life Assur. Soc. use of Reilly* v. *Wetherill*, 62 CCA 579, 127 Fed. 947.

Money or property used to perpetrate a fraud cannot be recovered by the party who has perpetrated the fraud.

In *Dent* v. *Ferguson,* 132 U. S. 50, the court said:

"If a party seeks relief in equity he must be able to show that on his part there has been honesty and fair dealing. If he has been engaged in an illegal business equity will not help him."

See, also:

Mil. & M. R. R. Co. v. *Soutter,* 13 Wall. 517.
Harriman v. *Northern Securities Co.,* 197 U. S. 244.
White v. *Barber,* 123 U. S. 392.
MacIntosh v. *Wilson,* 81 Ia. 339, 46 N. W. 103.

In the case of *Second Russian Insurance Co.* v. *Miller,* 268 U. S. 552, the court said:

"By our own law payments made under contracts which are illegal where the parties are *in pari delicto* may not ordinarily be recovered. The law leaves the parties where it finds them and gives no relief. *Thomas* v. *City of Richmond,* 12 Wall. 349, 20 L. Ed. 453; *Higgins* v. *McCrea,* 116 U. S. 671, 6 S. Ct. 557, 29 L. Ed. 764; *White* v. *Barber,* 123 U. S. 392, 423 S. Ct. 221, 31 L. Ed. 243; *Dent* v. *Ferguson,* 132 U. S. 50, 10 S. Ct. 13, 33 L. Ed. 242; *St. Louis R. R.* v. *Terre Haute R. R. Co.,* 145 U. S. 393, 407, 12 S. Ct. 953, 36 L. Ed. 746; *Harriman* v. *Northern Securities Co.,* 197 U. S. 244, 294, 25 S. Ct. 493, 49 L. Ed. 739; *Farrington* v. *Stucky,* 165 F. 325, 330, 91 CCA 311; *Levy* v. *Kansas City,* 168 F. 524, 93 CCA 523, 22 L. R. A. (N.S.) 862. While there are exceptions to this rule, appellant's case does not fall within any recognized exception and the record suggests no special consideration of equity or of our own public policy which would justify an exception in this case."

The transaction by which the bonds were procured was not only *malum prohibitum,* but was *malum in se* in that it was founded in fraud and in acts that contravened the penal statutes.

The situation is analogous to one where a party conveys his property to another with intent to defraud his creditors and then sues the grantee to recover such property. As held in the case of *Weir* v. *Day*, 57 Iowa 84, recovery cannot be had. Where such an action is tried, the determination thereof necessarily is a final adjudication and the grantor in such situations would not be entitled to maintain a second suit involving the same question.

In the present case the court has found that the stock was used in a fraudulent conspiracy to fraudulently obtain the bonds involved, and that the Phoenix Finance Corporation is not entitled to return of the stock. The question of the return of the stock was in issue and involved in the trial of this cause and fully litigated as shown in this brief, *supra*, pages 104-110, in support of the court's finding, 9-b, and the Phoenix again presented the issue of the return of the stock and submitted it to the court for decision on its petition for modification of decree. That court decided it and that decision has been affirmed by the circuit court. That Phoenix is not entitled to the return of the stock is fully sustained by the authorities cited above.

This court in passing upon the order of the trial court denying the petition for modification of the decree in which Phoenix asked that there be reinvested in it the 517 shares of bridge stock, said:

> "In refusing to modify the decree to require the bridge company to return to Phoenix the 517 shares of stock surrendered in exchange for bonds, the court invoked the maxim that 'he who had done iniquity shall not have equity.' This 'clean hands doctrine' is subject to the familiar limitation that a plaintiff is

not barred from relief in a court of equity unless his wrong has an immediate and necessary relation to the equity for the enforcement of which he prays. (Citing cases.) In the present case the district court adopted the view that all of the transactions leading up to the issuance of the bonds were steps in a single fraudulent enterprise to obtain ownership of the bridge after a foreclosure. We are not disposed to hold that this view of the lower court is wrong; and therefore we cannot say that appellants are entitled to have relief in equity in respect to any part of the fraudulent enterprise. It may be added that the record does not compel the inference that there was no fraud in the original issuance and transfer to the Phoenix of the 517 shares of stock. Having determined that the appellants had no standing to maintain their suit, the district court has neither the right nor the duty to compel the bridge company to restore what it had received from the bondholders. * * * Under these long established principles of equity and the pleadings and proof in this cause, the court did not err in refusing to modify the decree as requested by appellants by granting to complainants affirmative relief against the defendant'' (R. 92-93).

There was nothing in the record to move a court of equity to grant to the petitioner any such affirmative relief. The record shows a case prosecuted by them for nearly five years to consummate the fraudulent conspiracy and to obtain the fruits thereof, and during all this time making it necessary for the Iowa-Wisconsin Bridge Company and its stockholders, the victims thereof, to go to large expense by way of costs, disbursements, and attorneys' fees to extricate themselves from the fraud perpetrated upon them, for which they can get no recompense here. Certainly there could be nothing in such a situation which would appeal to a court of equity.

Phoenix Finance Corporation is not entitled to relitigate this question by merely repleading the same transaction and thereby involving the bridge company in the expense of defending in Delaware or requiring it to again present the evidence involved in this case.

United States v. *California & O. Land Co.*, 192 U. S. 355, 24 Sup. Ct. 266.

The matters between Phoenix Finance Corporation and the bridge company have been fully litigated and determined.

And as stated in *S. Pacific Ry. Co.* v. *U. S.*, 168 U. S. 1, 43 L. Ed. 355, 185 S. Ct. 18, 28:

> "A judgment upon the merits constitutes an absolute bar to a subsequent suit upon the same cause of action *in respect to every matter offered and received in evidence or which might have been offered to sustain* or defeat the claim in controversy." (Emphasis supplied.)

See also:

Rew v. *School District*, 125 Iowa 28, 98 N. W. 802.

Bagley v. *Bates*, 223 Iowa 836, 273 N. W. 934.

This matter was not only involved in the original trial but the trustees and Phoenix again presented the matter in petition for rehearing and modification of decree (F.R. 223), to which answer was filed alleging that the 517 shares of capital stock surrendered by Phoenix to the bridge company were so turned over as a part of the fraudulent scheme, plan and conspiracy to procure bonds (F.R. 398), and such petition for rehearing was denied and the matter fully determined (F.R. 411-413). Not only

is the court's decree *res judicata* thereof, but the court's ruling and order on petition for rehearing is *res judicata.*

Spencer v. *Watkins* (8 CCA), 169 Fed. 378, cert. den. 215 U. S. 605.
Bernard v. *Idaho Bank & T. Co.*, 21 Idaho 598, 121 Pac. 481, Ann. Cas. 1913E 120.
American Surety Co. v. *Vivian F. Baldwin,* 287 U. S. 156.

(k) There was no misunderstanding in the submission of the case to the Master.

The entire matter was submitted to the Master for decision at one time (F.R. 694). The court's ruling on petition for rehearing is an adjudication that there was no misunderstanding (F.R. 411). That ruling was assigned as error by trustees and Phoenix (F.R. 507 and 527), and was again urged in the Circuit Court of Appeals and the trial court's decision affirmed, and that decision cannot be collaterally attacked by re-assertion of the same matter.

Spencer v. *Watkins* (8 CCA), 169 Fed. 378, cert, den. 215 U. S. 605.
Root v. *Woolworth,* 150 U. S. 401.
Nash v. *Williams,* 20 Wall. 226, 22 L. ed. 254, 259.

In none of the cases cited by petitioner was there a consent reference of the entire case. Those cases merely held that where the validity of the bonds and mortgage and trust deed were *admitted and proven* that then it was not necessary to show in whose hands the bonds were or to require their production prior to the decree. None of the cases cited by petitioner hold that a fraudulent mortgage or deed of trust and fraudulent bonds without consideration may be foreclosed without trial determining

the question of the fraud and invalidity inhering therein and the amount due, if any.

In *Speers Sand & Clay Works* v. *American Trust Company* (CCA 4), 20 Fed. (2d) 333, 336, where the validity of a large number of corporate bonds secured by mortgage was in dispute, the court held that decree of sale in foreclosure proceedings before determination of the amount and legality of the bonds was premature and that such decree should be set aside. The court said:

> "The defendant and bondholders of all bonds, the title to which is undisputed, have the right to have such questions adjudicated and the amounts and ownership of the bonds fixed and determined, before the sale of the mortgaged property is authorized by the court. This is especially true in the instant case where the validity and title of so large a quantity of bonds is disputed."

In *James* v. *Milwaukee & Minn. Ry. Co.*, 6 Wall. 752-756, where the amount of bonds in the hands of *bona fide* holders were less than $200,000 and the notice of sale set forth that the mortgage debt was $2,000,000 and that $70,000 interest was due, it was held that the sale could not be upheld without sanctioning the grossest fraud and injustice.

See also:

Stewart v. *Florida G. & W. Ry. Co.* (CCA 5), 255 Fed. 616.
41 C. J., p. 865, Sec. 1066.
41 C. J., p. 433, Sec. 306.
Nashua Savings Bank, et al. v. *Burlington Elec. Light Co., et al.* (C.C.S.D. Iowa), 99 Fed. 14.

POINT THREE.

(Answer to Petitioner's Point Three.)

The injunction orders against Phoenix do not violate principles of equity jurisdiction.

The fact that the defense of *res judicata* can be urged in the Delaware court does not furnish any reason why injunctive relief should not be granted.

In Story on Equity Jurisprudence (14th ed.), Sec. 1194:

> "(1) Exercise of jurisdiction of courts of equity to stay proceedings at law by injunction can be traced back to the beginning of the reign of Henry VII, and was consistently upheld despite the objection of courts of common law."

Section 1209 states:

> "* * * And if after a decree in equity a party shall proceed at law for the same matter they will interfere by way of injunction. So if a decree is made against a party on the merits, and he afterwards brings a bill in a foreign court for the same subject matter, a court of equity will grant an injunction against proceeding in such foreign suit." (Citing *Booth* v. *Leycester*, 1 Keen R. 579.)
>
> "Indeed wherever after a bill is filed in equity the party institutes a suit at law for the same matter, it is treated as a contempt of court, for the jurisdiction has already attached in equity; and it is a gross oppression to vex another with a double suit for the same cause of action." (Citing Edin on Injunctions, Ch. 2, pp. 34-38.)

Section 1227 states:

> "Following a discussion of the rights of courts of equity to interfere to suppress vexatious litigation, Mr. Justice Story says:
>
> " 'Upon the same ground that the courts of equity have interposed by way of injunction to prevent a party who has been discharged from a contract by the sentence of a foreign court from being sued on the contract in the courts of law of another state. Such a sentence if obtained on the merits is, or certainly ought to be, conclusive between the parties, and as such there would seem to be a complete defense at law against a new suit by the plea of *res judicata*. But courts of equity have deemed it right nevertheless to sustain the jurisdiction, because the nature and effect of a foreign judgment may not be without hazard and embarrassment in a suit at law, and there is a great difference between domestic and foreign judgments in their forms as well as in their effects as records.' "

The original cause of action, if any, arose in Iowa. The mortgaged property, over which the original contention arose, is situated in Iowa, except one end and dike of the bridge which is in Wisconsin. The witnesses all reside in Iowa and Minnesota, except one whose deposition was taken in Chicago, and one lives in Chicago and testified at the trial, and except the former president of Phoenix, who resides in Florida, but who testified in person at the original trial in Iowa. (F.R. 532, 561, 565, 582, 587, 588, 608, 613, 617, 619, 620, 624, 637, 648, 650, 653, 655, 663, 665, 670, 672, 685, 538.) Twenty-nine witnesses thus residing testified by deposition or in person at the trial, a number of them as unwilling, adverse witnesses called by interveners in behalf of the bridge company.

On September 23, 1938, after the Circuit Court of Appeals decision, the Phoenix petitioned that court for stay of mandate on the ground that it intended to apply to the Supreme Court of the United States for writ of certiorari. On October 3, 1938, the stay was granted (F.R. 1716-1717). Petition for certiorari was filed in this court on October 26, 1938. In the meantime, without awaiting the decision of this court, and with the obvious purpose of not complying with it, if adverse, Phoenix on September 29, 1938, filed its first Delaware action (Ex. SC-1, R. 294-301). Phoenix' petition for certiorari was denied on December 5, 1938 (305 U. S. 650), and rehearing was denied January 3, 1939 (305 U. S. 676). Thereafter Phoenix filed the various other suits and the mortgage.

The bridge company's principal place of business is at Lansing, Iowa, although it is incorporated in Delaware. The Phoenix principal place of business was at Des Moines, Iowa, prior to its migration to Florida.

The claims made against the bridge company and determined in this cause are identical with those now made against the bridge company in the Delaware suits—based on the same alleged obligations. In this case the court found those alleged obligations to be part and parcel of a general plan and conspiracy to defraud the bridge company and its stockholders out of their property without consideration (F.R. 157). Now it is sought to re-litigate the same matters, divided into five different lawsuits, four at law and one in equity, over one thousand miles from the location of the original trial, and instead of in Iowa, at a place where none of the witnesses reside. Attendance of witnesses there could only be had at great expense, and the attendance of unwilling witnesses could

not be had at all. Some of the witnesses may be dead. Trial with only depositions on the part of the bridge company would be very disadvantageous to it, especially in the Delaware law actions, and advantageous to the Phoenix, whose former president, chief actor in the conspiracy, the Master found unworthy of belief (F.R. 129-134). Trials in five different actions of parts of the one original conspiracy would involve the proving of substantially the whole conspiracy in each Delaware action for proper defense. The expense would be enormous and the opportunity of defense inadequate. Such actions would also involve appeals and ultimate petitions for writs of certiorari to this court. This would be true even if the bridge company were successful, because Phoenix is not disposed to abide by adverse judicial decisions.

This case was particularly one of equitable cognizance, as shown by the record on file. It involved complicated accounts and accounting and a great mass of exhibits, books of account and records, difficult, if not impossible, to adequately present at law to a jury on retrial of various parts of this cause. Accounting has always been held by this court to be of equitable jurisdiction. *Winston & Co.* v. *Georgia & F. R. R., et al.*, 34 Fed. (2) 163.

The bridge company, as shown by the opinion, findings and decree of the trial court and of the Circuit Court of Appeals in this case, has good defenses to all of said actions, in addition to the fact that they have been adjudicated, which would necessarily have to be supported by evidence to protect its interests in the event the Delaware court ruled against the plea of *res judicata*. It might be asserted that on the offer of evidence in such actions

the bridge company could object on the ground that it conflicted with the previous adjudication, but if such objection should be overruled, it would immediately be necessary for the bridge company to have its evidence as to its other defenses available. The federal courts having first obtained jurisdiction have the prior right to construe and to determine the effect of their decrees and orders.

In *Oates* v. *Morningside College* (1934), 217 Iowa 1059, 252 N. W. 783, wherein plaintiff was executor of the estate of Trimble, deceased, late of Buena Vista County, Iowa, the decedent had given the defendant a note secured by mortgage on Iowa real estate. The defendant brought an action on the note and mortgage in foreclosure proceedings in Iowa, naming the executor defendant therein. The executor demurred to the petition on the ground that no claim had been filed within twelve months after his appointment as provided in the statute of limitations, which was sustained as to any liability of plaintiff as executor. The defendant, plaintiff in that action, obtained a judgment *in rem* for the foreclosure of the mortgage, and the action against the executor was dismissed by court's ruling on demurrer. The mortgaged property was bid in for $2,136.38 less than the amount claimed without deficiency judgment. Ancillary administration was taken out in South Dakota to enable the executor to carry out the terms of the will. While the ancillary administration was pending the defendant filed a claim in the ancillary estate in South Dakota for the deficiency amount not realized in the foreclosure action in Iowa. Both parties were residents of Iowa. Plaintiff, executor, then brought action to enjoin the defendant from prosecuting the action brought against the ancillary

estate in South Dakota on the ground that it would be inequitable, unjust and harassing, and cause the plaintiff irreparable injury; that the action had already been litigated in Iowa, and that the proceeding in South Dakota was an attempt to evade the effect of the adjudication upon the same indebtedness already made by the District Court of Pocahontas County, Iowa, and an attempt to evade the public policy and laws of Iowa, under which the claim filed in South Dakota was already barred by the statute of limitations of Iowa. The court quoted with approval the language of the court in *O'Haire* v. *Burns*, 45 Colo. 432, 100 Pac. 755, 757, 25 L. R. A. (N.S.) 267, as follows:

> "We have no doubt but that Mr. Burns could have pleaded in the Iowa actions the former litigation in this state and the result thereof as a complete defense, and, if established by proper evidence, it would have received the full faith and credit by the Iowa court to which it is entitled under the Constitution of the United States, but why compel him to go over 600 miles to a foreign jurisdiction from that from which both parties reside, or from where the original cause of action, if any, accrued, from where the property over which the original contention arose was situated, and from where all the witnesses reside, in order to present these facts to a foreign tribunal? We have been furnished with no principle of law or equity nor process of sound reasoning why this should be done and are of the opinion none can be presented. Besides, if O'Haire is allowed to continue his Iowa suit, and is defeated, under this same rule he could, if aided by persons with means, bring another action in some other state wherever perchance he might secure personal service upon Mr. Burns, and thus compel him to again defend the same action with at least the plea and proof of *res judicata* and so continue with-

> out any redress. The fallacy of the statement is itself an answer to it. This method of equitable relief appears to have been approved by the great weight of authorities, and for answer to the able argument of counsel against it, we refer to the reasons assigned in support thereof in the following cases: *Cole* v. *Cunningham*, 133 U. S. 107, 10 S. Ct. 269, 33 L. Ed. 538. • • •"

And the court said:

> "It appearing from the record that the claim now filed in the ancillary estate in South Dakota has already been adjudicated by the courts of Iowa in the foreclosure proceedings referred to, *we believe it would be clearly inequitable and unjust, and would cause great hardship and irreparable injury* upon this estate to compel the executor hereof to again litigate the same matter in the courts of South Dakota. For this reason we believe the lower court erred in not granting the relief prayed for in this action."

As previously noted the decision of the Delaware Superior Court in the one case was not in existence at the time this cause was submitted on hearing on permanent writ of injunction March 11, 1940, and of course this case should be considered as of the date of its submission. At that time all the Phoenix needed to do was to dismiss its cases. If it has since obtained any judgment it is necessary for it to satisfy it under its stay bond herein. That was not before the trial court nor mentioned in Phoenix' statement of points to be relied on on appeal (R. 732-735).

POINT FOUR.

(Answer to Petitioner's Point Four.)

The permanent prohibitory and mandatory injunction against Phoenix did not violate Section 265 of the Judicial Code.

The injunction does not violate Section 265 of the Judicial Code (28 U.S.C.A., sec. 379). The bridge company was entitled to an injunction as granted by the court. The federal court first acquired jurisdiction. The federal court had appointed a receiver and taken into legal custody all of the property of the bridge company of every description; it had rendered its opinion, findings of fact and conclusions of law and final decree, reserving jurisdiction to deal with all matters arising under the receivership and in connection with adjustment and payment of taxes and counsel's fees before any of the Delaware actions were commenced. This action is still pending in the United States District Court, Northern District of Iowa, with the receiver in charge of all of the bridge company's property.

Judicial Code, Section 262 (28 U.S.C.A., Sec. 377), provides:

> "Power to issue writs. *The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.*"

Judicial Code, Section 265, is not a jurisdictional statute, but a mere limitation upon the general equity

powers of the federal courts, preventing relief by injunction in the cases covered by it.

Smith v. *Appel* (Kan. 1924), 264 U. S. 274, 44 S. Ct. 311, 68 L. ed. 678.
Patton v. *Marshall* (W. Va. 1909), 173 F. 350, 97 CCA 610, 26 L. R. A. (N.S.) 127.

Section 265 of the Judicial Code must be construed in connection with Section 262 of the Judicial Code, and if a federal court has first obtained jurisdiction of a case it can take such action as may be necessary to maintain its authority and enforce its decrees.

Lanning v. *Osborne* (C.C.), 79 Fed. 657, 662.
Julian v. *Central Trust Co.*, 193 U. S. 93, 24 S. Ct. 399, 48 L. ed. 629.
French v. *Hay*, 22 Wall. 250-253, 22 L. ed. 857.
Dietsch v. *Huidokoper*, 13 Otto 494, 103 U. S. 494, 26 L. ed. 497.

Section 265 of the Judicial Code does not deprive a district court of the jurisdiction otherwise conferred by the federal statutes, but merely goes to the question of equity in the particular bill, making it the duty of the court, in the exercise of its jurisdiction, to determine whether the specific case presented is one in which the relief by injunction is prohibited by this section or may nevertheless be granted.

Sovereign Camp W. O. W. v. *O'Neill*, 266 U. S. 292.
Smith v. *Apple*, 264 U. S. 274.

Section 265 of the Judicial Code applies only to cases where the proceedings are first commenced in state courts.

Hamilton v. *Walsh* (C.C.R.I. 1885), 23 F. 420.
Lanning v. *Osborne* (C.C. Cal. 1897), 79 F. 657.
Jewel Tea Co. v. *Lee's Summit, Mo.* (D.C. 1912), 198 F. 532, affirmed (CCA 1914) 217 F. 965.
Kansas City Gas Co. v. *Kansas City* (D.C. Mo. 1916), 198 F. 500.

In *Looney* v. *Eastern Texas R. R. Co.*, 247 U. S. 214, 38 S. Ct. 460, 462, the court said:

> "The use of the writ of injunction, by federal courts first acquiring jurisdiction over the parties or the subject-matter of a suit, for the purpose of protecting and preserving that jurisdiction until the object of the suit is accomplished and complete justice done between the parties is familiar and long established practice. (Citing authorities.) So important is it that unseemly conflict of authority between state and federal courts should be avoided by maintaining the jurisdiction of each free from the encroachments of the other, that section 265 of the Judicial Code, Revised Statutes, section 720, Act of March 2, 1793, c. 22, 1 Stat. L. 334 (Comp. St. 1917, #1242), has repeatedly been held not applicable to such an injunction." (Citing authorities.)

In *Bethke, et al.* v. *Grayburg Oil Co.* (5 CCA), 89 Fed. (2) 526, cert. denied 302 U. S. 730, where receivers were appointed by the United States District Court for the Western District of Texas for Grayburg Oil Company on a bill to foreclose a mortgage deed of trust securing an issue of bonds. The bill alleged that the company was solvent, but in danger of becoming insolvent. The receivers were authorized to disaffirm leases. Appellants

held lease and filed claim thereon. After the federal receivership had resulted in a compromise of claims by partial payment to appellant, a final judgment and return of the property to the corporation in receivership and after termination of the receivership proceedings, appellants filed suit in District Court of Hayes County against the Grayburg Oil Company to recover $12,000 rent under the lease, less credits which included amount received in settlement of claim in receivership proceeding. Grayburg Oil Company filed a bill in the receivership proceedings in the federal court against appellants for interlocutory and final injunction to restrain them from prosecuting the suit in state court. Appellants moved to dismiss the ancillary bill for want of equity, mainly on the ground that defendant had defense at law in state court. The appeal was from final decree awarding injunction against appellants. Appellants contended that suit in state court was *in personam* and did not involve lien on property under dominion of federal court, and that they were not bound by receivership proceedings. The court, after considering Section 265 of the Judicial Code and reviewing the decisions of this court, held that the federal court had ancillary jurisdiction to enjoin a subsequent action in the state court *in personam* to relitigate the same matters and to enforce and effectuate its decrees, and that appellants were bound by the receivership proceedings, and that the injunction was properly granted.

The court said:

> "Mrs. Bethke contends on her own behalf that the realty leased to Grayburg Oil Company was her separate property and that she was not bound by the acts of her husband in connection with the claim.

The contention is frivolous. It is apparent from the record that she personally participated in urging the claim and received the benefit of the payment made on it.

"*There is no doubt that the District Court was justified in issuing the injunction in aid of its jurisdiction and to protect the rights of the Grayburg Oil Company secured by the judgments in the receivership proceedings. An adverse decision by the state court would put appellee to great trouble and expense and deprive it of the benefit of the judgment obtained in the federal court.* Furthermore, it may be presumed that if appellants were permitted to re-litigate in a state court the issues that were finally decided in the federal court, other creditors to a large number would be encouraged to do the same. There must be an end to litigation.

"It would have been wrong for the District Court to have entertained the cross-bill or to have transferred the case to the law side."

In *Local Loan Co.* v. *Hunt*, 292 U. S. 234, 54 S. Ct. 695, 78 L. ed. 1230, Hunt had been discharged in bankruptcy. Thereafter the loan company brought suit in a municipal court of Chicago against Hunt's employer to recover on an assignment of salary amounts accruing to Hunt after his discharge in bankruptcy. Those proceedings had ended. Hunt filed a bill in the bankruptcy court and obtained an injunction against further prosecution of the suit in municipal court. This court held that the proceedings being ancillary and dependent the jurisdiction of the court followed the original cause and might be maintained without regard to the citizenship of the parties or the amount involved, and notwithstanding the provisions of Section 265 of the Judicial Code, and that the

injunction properly issued, and that notwithstanding the state court had jurisdiction and that Hunt might intervene and urge his discharge in defense of that action *that such legal remedy thus afforded would not be adequate to meet the requirements of justice; that it would involve an obvious long and expensive course of litigation and would put him to the necessity of taking repeated appeals and deprive him of an adequate remedy.* In considering that case as an authority in this case it is immaterial that the original jurisdiction of the federal court was in bankruptcy because those proceedings had ended, and the ancillary bill did not come under the provisions of the bankruptcy act, but under the powers of the court in equity, the same as the instant ancillary bill.

In *Garner* v. *Second National Bank of Providence, et al.* (1 CCA, April 16, 1895), 67 Fed. 833, which was an action in equity involving rights to real estate, wherein an interlocutory decree had been rendered for complainant and the cause referred to a Master for an accounting of rents and profits, the complainant, pending proceedings before the Master, commenced an action at law in the Superior Court of the State of New York to recover the same rents and profits, and subsequently moved to discontinue the suit in equity and refused to have the Master's report opened. Defendant filed a petition in the cause asking that the complainant be enjoined from prosecuting her action at law, and that she be required to dismiss the same. The Circuit Court of Appeals, in its opinion, pointed out that complainant was not entitled to have the action in the federal court dismissed; that in that case the expense and time involved in the litigation, which resulted in the decree, independently of other considerations, rendered it grossly inequitable to permit

"such disposition of any part of the suit as would make possible a new contest over any question at issue," and that the provisions of Section 720 of the Revised Statutes, present Judicial Code 265, did not apply to proceedings incidental to jurisdiction properly acquired by a federal court for purposes other than the enjoining of proceedings in a state court, and that the complainant was properly perpetually enjoined and required to dismiss the suit in state court.

In *St. Louis Min. & Milling Co.* v. *Montana Mining Co.* (CC), 148 Fed. 450, it was held that a party who has appeared in a Federal Court and contested an action therein through both trial and appellate court, the result being final judgment against him, will not be permitted to render such judgment ineffectual by instituting and maintaining a new suit in a state court, the purpose of which is to re-litigate the questions determined by such judgment with the same adversary, and that Revised Statutes Section 720, present Judicial Code Section 265 does not prevent a Federal Court from enjoining a party to an action before it from prosecuting a suit in a state court when necessary to protect its own prior jurisdiction or to make effectual its own prior judgment, determining the rights of the parties before it.

The court said, after reviewing the decisions of this court:

> "They further establish that section 720 was not intended to impair the jurisdiction of the federal courts, as that jurisdiction had been conferred by the Constitution and laws, which empower courts of equity to interfere and effectuate their own decrees by injunction or writs of assistance, in order to avoid the relitigation of questions once settled between the parties. Story's Equity Jurisprudence,

#959; *Central Nat. Bank* v. *Stevens*, 169 U. S. 432, 18 S. Ct. 403, 42 L. ed. 807; Foster's Federal Practice, #211, Desty's Fed. Procedure, vol. 2, p. 803."

The Federal Court has unquestioned power to effectuate its decrees and to prevent relitigation of the same matter.

In *Root* v. *Woolworth* (1893), 150 U. S. 401, 14 S. Ct. 136, 139, the court said:

> "It is well settled that a court of equity has jurisdiction to carry into effect its own orders, decrees, and judgments, which remain unreversed, when the subject-matter and the parties are the same in both proceedings. • • •
>
> "The jurisdiction of courts of equity to interfere and effectuate their own decrees by injunctions or writs of assistance, in order to avoid the relitigation of questions once settled between the same parties, is well settled. Story, Eq. Pl. (9th Ed.) #959; *Kershaw* v. *Thompson*, 4 Johns. Ch. 609, 612; *Schenck* v. *Conover*, 13 N. J. Eq. 220; *Buffum's Case*, 13 N. H. 14; *Shepherd* v. *Towgood*, Turn & R. 379; *Davis* v. *Bluck*, 6 Beav. 393. In Kershaw vs. Thompson the authorities are fully reviewed by Chancellor Kent, and need not be re-examined here."

In Sarson v. *Maccia* (N. J. Ch.), 108 Atl. 109, at 111, the court said:

> "It is the settled law of this state (and I quote from the opinion of this court in *Putnam* v. *Clark*, 34 N. J. Eq. 532, affirmed by the Court of Appeals) that—
>
> "'If, after a decree in equity, a party shall proceed at law for the same matter, equity will restrain him by injunction. Such suit at law is treated as contempt of court, for it is gross oppression to vex

another with a double suit for the same cause of action.'" (Citing cases.)

In *French* v. *Hay*, 22 Wall. 250, 22 L. Ed. 799, the court said:

> "Having the possession and jurisdiction of the case, that jurisdiction embraced everything in the case, and every question arising which could be determined in it, until it reached its termination, and the jurisdiction was exhausted. While the jurisdiction lasted, it was exclusive, and could not be entrenched upon by any other tribunal."

The court also speaks of the results which would follow if relief could not be given by the federal tribunals where their jurisdiction attached, and demonstrates that their decrees might be nullified, in so far as any protection could be given by them.

> "Instead of terminating the strife between him and his adversary, they would leave him under the necessity of engaging in a new conflict elsewhere. This would be contrary to the plainest principles of reason and justice. The prohibition in the judiciary act against the granting of injunctions by the courts of the United States, touching proceedings in state courts, has no application here. The prior jurisdiction of the court below took the case out of the operation of that provision."

Also see:

Hickey v. *Johnson* (8 CCA), 9 Fed. (2) 498.
Sterling v. *Gredia*, 5 Fed. Supp. 329.
American Surety Co. of N. Y. v. *Baldwin*, 2 Fed. Supp. 679.
Hesselberg v. *Aetna Life Ins. Co.* (8 CCA), 102 Fed. (2) 23.

Toucey v. *New York Life Ins. Co.* (8 CCA), 102 Fed. (2) 16, 33.
Swift v. *Black Panther* (8 CCA), 244 Fed. 20.
Wilson v. *Alexander* (5 CCA), 276 Fed. 875.
Julian v. *Central Trust Co.*, 193 U. S. 93.
Riverdale Cotton Mills v. *Alabama-Georgia Mfg. Co.*, 198 U. S. 189.
Wells Fargo v. *Taylor*, 254 U. S. 175.
Kern v. *Huidekoper*, 103 U. S. 494.
Munro v. *Raphael*, 288 U. S. 485.
Gunter v. *Atlantic Coast Line R. R. Co.*, 200 U. S. 273.
Slaughter v. *Slaughter* (5 CCA), 48 Fed. (2d) 210.
St. Louis-San Francisco R. R. Co. v. *McElvaine*, 253 Fed. 123.

POINT FIVE.

(Answer to Petitioner's Point Five.)

The petitioner's point five has no application to the case at bar. The matters involved herein were after full hearing determined by the federal court.

POINT SIX.

(Answer to Petitioner's Point Six.)

All questions of jurisdiction were determined in the original hearing and such determinations are *res judicata.*

In the original hearing it was determined that Phoenix was fully represented by the trustees. On appeal to the Circuit Court of Appeals, that court stated:

> "At that time, before Phoenix became a party, there was complete diversity of citizenship. Had Phoenix not become a party the court could have pro-

ceeded to final judgment, granting or denying foreclosure. It could have decided every issue including the validity of the trust deed, and the amount of the debt secured thereby; and the decree would have been binding upon the bondholders without their presence as parties to the record."

Then speaking of appellant's contention that the proceeding below was a consolidation of two separate and distinct suits, one brought by the trustees to foreclose the trust deed and one brought by the bridge company and interveners to cancel the bonds held by Phoenix, and that jurisdiction as to each controversy must be determined separately, the court said:

> "This is without merit. * * * Furthermore, if the controversy between the two Delaware corporations should in any way be considered as a separate controversy involving only the validity of certain of the bonds, then it was ancillary to the foreclosure proceeding, and jurisdiction attached irrespective of citizenship because the subject matter had been drawn into the federal court under the receivership before Phoenix became a party. (Citing authorities.) The court did not err in overruling appellants' attack on the jurisdiction."

(F.R. 1689, 1694.) Petition for writ of certiorari was denied (305 U. S. 650).

The authorities cited by Phoenix under this point are mere repetition of what it cited on its first petition for writ of certiorari before this court, entitled Phoenix Finance Corporation, petitioner vs. Iowa-Wisconsin Bridge Company, respondent, No. 438, and the respondent asks the court to take judicial notice of its brief in response thereto to avoid repetition here.

The question of jurisdiction was decided as a contested matter on the original cause by motion to vacate the decree, and on appeal was determined by the Circuit Court of Appeals, and certiorari having been denied by this court, that question was *res judicata*, and cannot again be presented.

Des Moines Navigation & R. R. Co. v. *Iowa Homestead Co.*, 123 U. S. 552.
Dowell v. *Applegate*, 152 U. S. 327.
Davis v. *Davis*, 305 U. S. 32.
Stoll v. *Gottlieb*, 305 U. S. 165.

The cases cited by petitioner are all cases in which

(a) It appeared from the complaint or answer filed that there was a substantial and indispensable interest in the lawsuit owned and held by a party not a party to the record and that adjudication could not be made of the controversy presented without the presence of such party unrepresented in the pending litigation; or

(b) Cases in which the introduction of an indispensable party holding an interest in the lawsuit, wholly unrepresented, ousted the jurisdiction of the court.

Neither situation exists in the instant case. The facts in the instant case are wholly different, and bring it directly within the rule announced in:

Souffront v. *Compagnie Des Sucreries*, 217 U. S. 475.
Anderson v. *Watt*, 138 U. S. 694, 704, 705.
Robbins v. *Chicago City*, 4 Wall. 657, 71 U. S. 657.
Lovejoy v. *Murray*, 3 Wall. 1, 70 U. S. 1, 19.
Hoskins v. *Hotel Randolph Co.*, 203 Iowa 1152, 211 N. W. 423, 427.

Furthermore, the question sought to be raised by petitioner was not raised before the trial court nor before the Circuit Court of Appeals (petitioner's points intended to be relied on on appeal R. 732-735) and cannot be presented for the first time in petition for writ of certiorari.

POINT SEVEN.

(Answer to Petitioner's Points Seven and Nine.)

Petitioner is not entitled to re-litigate this cause since it has been fully adjudicated.

Petitioner on page ninety-six of its brief speaks of "certain *bona fide* claims" in utter disregard of the fact that the federal courts have determined that they have no existence. And then refers to its Exhibit SC-114, not in evidence, in support thereof. Phoenix attached a like report by Ernst & Ernst to its exceptions to the Master's report, made after the Master's report, of an alleged examination of books and certain other documents which were not in evidence (F.R. Supp. 23). This report, however, was not printed, but the preceding figures (F.R. Supp. 22-23) show a claim by Phoenix at that time that it had paid $112,379.03, and the trial court found there was no foundation for the report (trial court's opinion, F.R. 177). Phoenix, in its petition for rehearing by affidavit of Lee J. Skoner, employee of Ernst & Ernst, referred to above, presents figures claimed to represent advances of Phoenix to the bridge company, Phoenix claiming by such affidavit advancements to the bridge company of $95,043.71 (F.R. 308-324). This petition was overruled (F.R. 411-413). Trustees and Phoenix assigned error on the ruling (F.R. 527-528). Before the Circuit Court of Appeals Phoenix contended that it had furnished $161,487.62, and the court found that the "figures are

confuted by the facts" (F.R. 1705). The court has judicially determined that there was nothing to Phoenix' claims, and the Phoenix was not entitled to make a mere re-assertion of them in face of the court's decisions.

Phoenix having committed the most aggravated fraud against the bridge company and having put the bridge company to enormous expense to extricate itself from such situation, now having granted itself absolution from its fraudulent conduct presumes to come back to the federal court to assert that it is here with clean hands and that its victim is the one whose hands are unclean, and that therefore this case ought to be re-tried.

After citation of authorities, which might be interesting from an academic standpoint, but have no application to this particular case, petitioner attempts to make an application by the bald assertion that the findings and conclusions referred to in the foreclosure cause are contrary to the facts, and insists that upon the application for injunction it was entitled to re-try those issues and prove that those findings and conclusions were not correct, although the case has been fully tried and a petition for rehearing was filed in which every matter attempted to be presented on the injunction hearing (except for discrepancies in the figures which appeared to vary according to the time of the making of a particular affidavit), was fully presented to the trial court.

Most of the authorities cited in Phoenix' brief are cited in 34 Corpus Juris, p. 779, Section 1198, under the heading "Judgments by Consent," note 9, among which is *Lawrence Mfg. Co.* v. *Janesville Cotton Milling Co.*, 138 U. S. 538, containing the language: "The prior decree was the consequence of consent, and not of the

judgment or decree, and this being so, the court had the right to decline to treat it as *res judicata.*" The case of *Hamilton* v. *Houghton,* 4 English Reports 290, cited by petitioner, for Lord Redesdale's Rule, also involved a decree *pro confesso.* Neither of the cases in their facts bear the remotest similarity to the case at bar.

The case of *Union Central Life Insurance Co.* v. *Drake* (8 CCA), 214 Fed. 536, is not similar. That was a second and independent suit and not an ancillary bill to preserve the fruits of the original decree. The court held that when the second suit is upon a different cause of action and between the same parties as the first, the judgment in the former is conclusive in the latter, as to each question which was or might have been presented and determined in the former.

The other cases cited by petitioner are cases not at all similar in facts to the instant case, and have no bearing on the question here presented.

In *Ashby* v. *Manly,* 191 Iowa 113 at 116, it is stated:

> "This count of the answer is the pleading of a counterclaim for fraud in the inception and procurement of the notes sued upon. The demurrer challenges the right to interpose a counterclaim of this character in a suit upon a judgment. If the judgment is valid and binding on the appellant, he cannot now plead, as a setoff or counterclaim to such judgment, the invalidity of the original obligation upon which the judgment was procured. We have held that, in a suit on a judgment, the defendant cannot be allowed to attack the judgment on account of a defense to the cause of action which might be interposed in the action on which the judgment has been recovered, where there is no allegation or proof of fraud in the procurement of the judgment."

Also see *Graves* v. *Graves,* 132 Iowa 199 at 204 and 205.

In *Abell* v. *Partello,* 202 Iowa 1236, 211 N. W. 868, the court said:

> "Equity will not set aside a judgment after a year and award a new trial for a newly discovered evidence where the grounds were discovered, or with reasonable diligence could have been discovered within the year."

And as stated in the *Graves* case, *supra,* "for if this could be done once, it could be done again and again, *ad infinitum.*"

In *Utah Power & Light Co.* v. *U. S.* (Court of Claims), 42 Fed. (2) 304, at 308, the court said:

> "In *Lawrence Mfg. Co.* v. *Janesville Mills,* 138 U. S. 552, 11 S. Ct. 402, 405, 34 L. ed. 1005, the plaintiff sought to have a former consent decree extended and then enforced and the court said:
>
> "'But where a party returns to a court of chancery to obtain its aid in executing a former decree, it is at the risk of opening up such decree as respects the relief to be granted on the new bill.'
>
> "Accordingly, the court held that it was at liberty to inquire whether circumstances justified the relief asked, and, the former decree having been entered by consent, the court had the right to decline to treat it as *res adjudicata. But in the case at bar no modification of the former decree is sought, the plaintiff stands on the decree as it is, and the case is not one in which a new trial of the former action can be had.*"

In *Southern Pac. R. Co., et al.* v. *U. S.*, 168 U. S. 1:

> "Whatever is new in the evidence now before us, touching that matter, is simply cumulative on the one side or the other. The application to consider that evidence is practically an application for a rehearing as to things directly determined in the former suits between the same parties, and which adjudication has never been modified. Such a course of procedure is wholly inadmissible under the settled rule of *res judicata.*"

Also see *U. S.* v. *Throckmorton*, 8 Otto 61-71, 25 L. ed. 93.

Deposit Bank of Frankfort v. *Board of Councilmen of the City of Frankfort*, 191 U. S. 499, 24 S. Ct. 154 at 159.

Rew v. *School District*, 125 Iowa 28, 98 N. W. 802.

The italicized statement on pages 97 to 98 of petitioner's brief is absolutely contrary to the original determination in the case. That there was nothing presented in the schedules of testimony proposed to be adduced by deposition or in the allegations of the answer, which were stricken by the trial court, which was not fully covered in the original trial of the case and in the petition for rehearing and affidavits attached to it, and we submit that every claimed item of indebtedness referred to in those schedules and in the proposed answer was passed upon by the trial court and by the Circuit Court of Appeals and held to be without foundation.

POINT EIGHT.

(Answer to Petitioner's Point Eight.)

The fraudulent mortgage was properly ordered satisfied and released.

The petitioner's assertion that the mortgage held fraudulent was a mortgage for $50,000, and for an alleged $9,000 Kramer & Hogg item is wholly without merit. The pretended mortgage has been adjudicated fraudulent and wholly without consideration. The $9,000 item was asserted in the trial as an alleged additional consideration for $97,000 of bonds. The mortgage having its inception in fraud was a dead instrument from the day of its execution, and was so found by the court, and the petitioner cannot now infuse it with life.

The record in this case shows that the court specifically found that the $50,000.00 mortgage was without consideration, fraudulent, and void, and Phoenix Finance Corporation, in contempt of the trial court's finding and decree, has caused said mortgage to be filed of record, and we contend that the bridge company was entitled to a mandatory injunction to remove such mortgage.

Mandatory injunctions may always be issued in the federal courts in proper cases.

> Encyc. Fed. Pro. Vol. 6, sec. 3088, and cases cited
> *Ex parte Lennon*, 166 U. S. 548, 17 Sup. Ct. 658.
> *Loisel, U. S. Marshal* v. *Mortimer*, 277 Fed. 882.
> *Trautwein* v. *Moreno Mut. Irr. Co., et al.*, 22 Fed. (2) 374, 376.
> *Pokegama, S. P. Lumber Co.* v. *Klamath River Lumber & Imp. Co.*, 86 Fed. 528.

It is well settled that a court of equity will protect the title of real property and may, by mandatory injunction, remove a cloud therefrom.

In *Root* v. *Woolworth*, 150 U. S. 401, the court said:

> "The power of the court to issue the judicial writ, or to make the order and enforce the same by a writ of assistance, rests upon the obvious principle that the power of the court to afford a remedy must be coextensive with its jurisdiction over the subject-matter. Where the court possesses jurisdiction to make a decree, it possesses the power to enforce its execution. * * *
>
> "When that court adjudges a title to either real or personal property to be in one as against another, it enforces its judgment by giving the enjoyment of the right to the party in whose favor it has been decided."

In Pom. Eq. Jur., Vol. 4, section 1810, it is stated:

> "Taxes on realty generally, and sometimes those on personalty as well, are made a lien upon real estate. Accordingly, if the proceedings are valid on their face, every such tax will cast a cloud upon the title to land. The prevention and *removal* of such clouds on title are well established and familiar grounds of equitable jurisdiction. Consequently, equity will interfere by injunction to prevent and remove the cloud cast by such an illegal or invalid tax * * *."

In *Key City Gas & Light Company* v. *Munsell, et al.*, 19 Iowa 305, the court held:

> "A court of equity will interpose by injunction to prevent a cloud being cast upon the title to real estate by a sale thereof, under execution against a party not the owner; when it is shown that such property is not subject to the satisfaction of the judgment under which the execution issued."

In *McKibbin* v. *Bristol, et al.*, 50 Mich. 319, 15 N. W. 491, the court held:

> "An equitable owner of lands in actual possession and claiming title in fee simple, can maintain a bill to enjoin a suit in ejectment brought against him by persons claiming under a succession of conveyances given in bad faith and for the purpose of defeating creditors; *and in the same bill he can also ask for a release of the apparent title held by such claimants.*"

In *Grand Rapids Trust Company* v. *Carpenter,* 229 Mich. 491, 201 N. W. 448, the property of a defunct corporation was placed in the hands of a receiver with an order containing the usual clause restraining interference with the receiver. Certain persons claiming to act as trustees of the defunct corporation put a mortgage on the property.

The court said:

> "The mortgage here involved was not only made in defiance of an injunction of the court, but it was upon property held by the receiver, and arm of the court: upon property in the custody of the law. It cannot stand. It is void as to the receiver, as to the court and should be set aside."

There can be no question that the recording of the fraudulent mortgage casts a cloud upon the title of the bridge company. It prevents the court from freely dealing with the property. It constitutes an interference with the jurisdiction of the court and is an attempt to render its decree and findings ineffectual.

Phoenix Finance Corporation, in its petition for rehearing and modification of decree, asked that the decree be modified so as to hold from adjudication the question of the validity of the $50,000.00 mortgage given by the bridge company, reserving the right to Phoenix to

re-litigate in another action, if it so desired (F.R. 223), which petition was overruled (F.R. 411-413).

Now, in face of that ruling, Phoenix contemptuously and viciously casts a cloud on the bridge company's title by filing the fraudulent mortgage and tries to put the bridge company in the position of having to commence an action to quiet title and try over the matters relating to the fraudulent mortgage which have been determined in this case. It is particularly a situation where the court should, by mandatory injunction, remove the cloud.

In *Toucey* v. *New York Life Insurance Company* (8 (CCA), 102 Fed. (2d), p. 16 at p. 20, this court said:

> "The federal court had heard the evidence and determined that Mr. Toucey has no rightful claim against the insurance company on account of the life insurance policy which he had sought to have reinstated and the court's final decree to that effect had been duly entered. If any necessity had been anticipated the federal court would doubtless have gone through the formality coincident with the decree of ordering Mr. Toucey to bring the policy into court for physical destruction by the marshal and would have admonished Mr. Toucey by appropriate writ of order to assert no claims under it."

The petitioner fully recognizes that all of the matters involved herein were adjudicated and determined in this cause when it made its application for modification of decree.

Conclusion.

We respectfully submit that the decision of the Eighth Circuit Court of Appeals should and ought to be affirmed.

FRED A. ONTJES,
WM. C. GREEN,
Counsel for Respondent.

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Supreme Court of the United States

OCTOBER TERM, 1940.

No. [redacted] 19

PHOENIX FINANCE CORPORATION, A CORPORATION OF THE STATE OF DELAWARE, PETITIONER,

VS.

IOWA-WISCONSIN BRIDGE COMPANY, A CORPORATION OF THE STATE OF DELAWARE, RESPONDENT.

RESPONDENT'S SUPPLEMENTAL BRIEF.

FRED A. ONTJES,
WM. C. GREEN,
Counsel for Respondent.

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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 624.

PHOENIX FINANCE CORPORATION, A CORPORATION OF THE STATE OF DELAWARE, PETITIONER,

VS.

IOWA-WISCONSIN BRIDGE COMPANY, A CORPORATION OF THE STATE OF DELAWARE, RESPONDENT.

RESPONDENT'S SUPPLEMENTAL BRIEF.

PREFACE.

In view of the fact that the Court has assigned this case for further argument respondent desires to submit the following supplemental brief.

On page 93 line 6 of respondent's brief there is a clerical error in the quotation from the master's report. The words "Phoenix Finance" should be changed to the words *"prima facie."*

Petitioner in its reply brief undertakes to avoid the force of the facts stated in respondent's brief by general assertions that they are not supported by the record. The statements in respondent's brief are fully substantiated by record references. The record is written and there should be no dispute about what it contains. The petitioner is unwilling to meet that record as it is and is undertaking to avoid it by a series of statements not supported by it and containing unjustifiable implications with respect to it. We feel that certain statements in petitioner's reply brief reflecting upon the Master, the trial court and the Circuit Court of Appeals, and upon the veracity of the statements contained in respondent's brief require a brief answer.

The petitioner assumes throughout its argument that Lord Redesdale's rule is applicable to this case. That it is wholly inapplicable is pointed out at the proper point in this argument *infra*.

Petitioner on page seven of its reply brief states: "With the striking of the major portion of the petitioner's answer and counterclaim there remains practically no material issue of fact." This statement is inaccurate. The issues tendered by the ancillary complaint are accurately set forth on pages 4 to 13 of respondent's brief. The designated "first defense" of petitioner's answer and counterclaim was not stricken. The remainder of the answer which was not responsive to the issues tendered by the ancillary complaint was stricken. The court in its ruling states: "The court being of the opinion that the remaining matter, including admissions and denials set forth in the first defense of said answer, designated as 'first defense' are sufficient for the proper consideration and determination of all issues *presented* by the supplemental and ancillary complaint" (R. 171-172).

The ancillary complaint and the first defense of Phoenix' answer presented the fact questions of whether all the items and matters involved in the Delaware actions and in the mortgage were previously adjudicated in this

foreclosure action. This involved the identity of the subjects presented in the Delaware actions and the mortgage described in the ancillary complaint with the matters considered and determined in this cause. On hearing the respondent bridge company asked the court to take judicial notice of the pleadings, evidence and records in this cause without exception, including the opinion and mandate of the Circuit Court of Appeals and offered them in evidence. Petitioner's counsel conceded that such judicial notice thereof should be taken. The respondent also offered in evidence certified, exemplified copies of the summonses, bill of complaint and declarations in the Delaware cases and a certified copy of the mortgage wrongfully recorded in Allamakee County, Iowa, and a certified, exemplified copy of the same mortgage recorded in Crawford County, Wisconsin (R. 260-272; 294-384).

The trial court who originally heard this case involving this voluminous record made findings of fact as to each of the Delaware actions and as to the mortgage, finding that the items and matters involved therein were involved in, considered, determined and adjudicated in this cause and made conclusions of law and entered final decree of injunction (R. 700-722). The Phoenix appealed therefrom to the Eighth Circuit Court of Appeals and that court reviewed and affirmed the trial court's findings of fact, conclusions of law and decree (R. 767-788). This presents the concurrent decision of the two courts, finding as facts that the matters involved in the Delaware actions and in the mortgage were involved in, determined and adjudicated in this cause.

In *Brainard* v. *Buck*, 184 U. S. 99, 22 S. Ct. 458, this Court said:

> "Upon the merits of the case, the two courts below have come to the same conclusion. The general finding of the trial court in favor of the complainants was a finding in their favor of all the material facts alleged in the amended bill, and those facts have been

repeated and affirmed in the court of appeals, and we are now asked to review and reverse those findings upon the testimony contained in the record. It ought not to be done in this case. It is the settled doctrine of this court that the concurrent decisions of two courts upon a question of fact will be followed, unless shown to be clearly erroneous."*[1]

The petitioner's assertions are directed almost wholly against the original record and not to the court's findings on hearing on ancillary complaint and petitioner's answer thereto, designated "first defense." As to the repeated statement that Phoenix did not participate in the trial and did not request and instigate the foreclosure action, the facts stated in respondent's brief as to the institution of the action are fully borne out by the references in respondent's brief pages 25 to 26 and substantially admitted in petitioner's original brief pages 5 and 6. As to its participation in the trial, see references in respondent's brief pages 37, 44-51, 56, 58, 60-66, 70.

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*[1]In *Dunn* v. *Lumbermen's Credit Ass'n*, 209 U. S. 20, 28 S. Ct. 335, this court said:

"We cannot, as we are asked to do by the appellants, reverse the findings of fact made by the Circuit Court and the Circuit Court of Appeals. Successively considering the same evidence, the two courts agree in the findings. In such a case in a suit in equity the findings will not be disturbed by this court, unless they are shown to be clearly erroneous. *Towson* v. *Moore*, 173 U. S. 17, 43 L. Ed. 597, 19 S. Ct. 332; *Brainard* v. *Buck*, 184 U. S. 99, 46 L. Ed. 449, 22 S. Ct. 458; *Shappirio* v. *Goldberg*, 192 U. S. 232, 48 L. Ed. 419, 24 S. Ct. 259. An examination of the voluminous testimony shows that it tended to sustain the findings, and that, to say the least, there is no ground for saying that the conclusions drawn from the evidence were clearly erroneous."

In *Alabama Power Co.* v. *Ickes et al.*, 302 U. S. 464, 59 S. Ct. 300, this court said:

"These findings were made, after hearing, by the district judge upon undisputed or conflicting evidence. The findings were not questioned by the court below; and since they are not without substantial support in the evidence, we accept them here as unassailable."

Petitioner on page 7 of its reply brief with reference to the Helmer N. Anderson bonds asserts: "Anderson was not a party to the foreclosure cause in any classification and did not participate in the cause directly or indirectly." This is a misstatement of the record. He was represented by the trustees and his bonds were in part allowed (Trustees' exceptions to master's report F. R. Supp. 7-9; F. R. 182-204; F. R. 1694).

As to the statement on pages 9-10 of the reply brief that the trustees did not act under section 10 of the trust indenture (F. R. 41) but under Section 3(c) (F. R. 37-38), petitioner is clearly attempting to avoid the effect of section 10 because it so thoroughly disposes of the contention that Phoenix was not represented by the trustees.

As to the intimation that there may be a question whether a power of attorney was granted under that section by the bondholders to the trustees, we need only look to the habendum clause of the trust indenture (F. R. 21 and 22) and the bonds (F. R. 14-16), to find that the bonds were issued under and in pursuance of the trust indenture, and that the indenture provided that the bonds should be issued, delivered, received and negotiated subject to its conditions.

Sections 3(c) and 10 are not alternative. Section 3(c) merely gives bondholders the right to compel the trustees "to protect and enforce their rights and the *rights of the bondholders* under this indenture by a suit or suits in equity or at law, whether for the specific performance of any covenant or agreement contained herein, or in aid of the execution of any power herein granted, or for any foreclosure hereunder, or for the *enforcement of any other appropriate legal or equitable remedy*," etc. (Emphasis supplied).

Section 10 contains the covenants of the company as to the action which may be taken by the trustees on default, and makes clear the rights of the trustees to re-

cover a money judgment either in connection with or without foreclosure.

The sections are complimentary and by the prayer of the bill (F. R. 10-11) it is clear that the trustees, acting at the request of Phoenix under section 3(c), proceeded to "protect and enforce * * * the rights of the bondholders," and were entitled, if they prevailed, among other things, to a deficiency judgment in addition to foreclosure. As a matter of fact, section 3(c) confers upon the trustees all the rights of representation of the bondholders here claimed to have existed, and section 10 simply makes the extent of those rights more specific insofar as the recovery of a money judgment either originally or by way of deficiency is concerned.

Petitioner devotes a great deal of space at pages 11, 27-43, in its reply brief disputing the master's and the court's original findings as to the control of the Iowa-Wisconsin Bridge Company, by John A. Thompson, and his associates, officers and directors of the Phoenix Finance Corporation and of its predecessors Phoenix Finance System, Inc. The petition of intervention charged such control (F. R. pp. 74, 78 to 82) and that matter was directly an issue on the original trial. The petitioner on page 31 of its reply brief quotes from the master's report and then asserts in italics "there is not a single record reference thus given by the master which supports those findings." The report of the master (F. R. 128) shows that the references given by the master refer to the pages of the original depositions, transcripts, books and exhibits in evidence and not to the pages of the printed record since that had not been printed at that time; the testimony being later reduced to narrative form and thereafter the record printed and petitioner's assertion is without record citation or foundation. Trustees and petitioner in their exceptions to the master's report assailed the master's findings of fact and conclusions of law as to control (Trustees' exception No. 2-c, F. R. Supp.

7, Phoenix' exceptions Nos. 1 and 2, F. R. Supp. 17-20). The trial court reviewed the master's report and evidently found that the master's citations to the original record supported his findings and the court overruled the exceptions (F. R. Court's opinion 161-162 and 166-179; court's findings of fact 179, 180, 181, 182, 183, 184, 188 to 202, decree pages 202-204).

The petitioner's assertions with respect to control are the same as made in its petition for re-hearing in slightly modified language. The same claim of percentages to stock ownership appear in its petition for rehearing and the citations made by petitioner for its present assertions nearly all refer to its petition for rehearing (F. R. 219, 254, 264, 267, 282, 284, 290, 292, 311, 312, 339, 340, 355 to 357, 375, particularly page 311). The assertions contained in the petition for rehearing were controverted by defendants' and interveners' answer thereto (F. R. 394-399). The petition for rehearing was overruled and this ruling affirmed by the Circuit Court of Appeals (F. R. 411-413 and 1707).

To hold and exercise control of a corporation, it is not necessary that the person exercising such control own and control a majority of the stock. It has been held that where there are a large number of stockholders, as in the instant case, that such control may exist though the party exercising it and those associated with him hold a percentage of the stock much less than a majority and exercise such control through their own holdings and by proxies which they are able to procure through their control of the management of the corporation.

U. S. v. *Union Pacific R. Co.*, 226 U. S. 61.
Delaware Hudson Co. v. *Albany and Susquehanna et al.*, 213 U. S. 435.

The question of control has been fully adjudicated. In addition to the facts stated and references given in respondent's brief pages 68 and 69 we have attached hereto as an appendix a statement of the facts relating to such

control with record citations fully supporting the findings of the court for use if this court is interested therein.

On page 12 of the reply brief counsel for petitioner asserts that no record references are given to support the statements on page 35 of respondent's original brief as to the $20,100 of bonds delivered as collateral to certain claimed indebtedness. In view of the fact that all the findings had been reviewed by the Circuit Court of Appeals upon the first appeal and full record references in support of them given in the brief on that appeal, it seemed unnecessary to burden this Court with such references. Counsel, however, overlooks the discussion of these bonds and appropriate references appearing at pages 46-48, 91-99, 100, 101-103 of respondent's original brief.

Only because of the statement of counsel in the reply brief do we give the following further record citations: Fraudulent bond interest items, F. R. 1571; 1563-5-7, 534; 1567, 1569; Offsets, Court's finding 24, F. R. 181-191; findings 27, F. R. 192, 28, F. R. 193, 29, F. R. 19, 30, F. R. 194. Evidence: Wilder $3,000 F. R. 582, 601, 627-629, 633, 819, 821, 1401, 1403, 1531; $14,000 "guaranty contract," Exhibit 3, F. R. 1393, 1395, 598, 640-641, 880-883, Exhibit Johns B, F. R. 1682, 1684, 1020, 117, 876, 880; commission on Thompson stock, F. R. 601, 602, 1529; Thompson notes, F. R. 604-605, 1131, 1535.

Petitioner on page 13 of its reply brief asserts "There is no evidence of any character to indicate any connection with any conspiracy or wrong-doing by Phoenix Finance Corporation." This is a misstatement of the record and contrary to the court's finding (No. 41 F. R. 202) "That the Phoenix Finance Corporation at the time of its organization was officered and controlled by the same officers as Phoenix Finance System, Inc., and took over the succession of both assets and liabilities with full notice of the facts and circumstances surrounding the bond issue in controversy in this case, and assumed the entire

fruits and activities of its predecessor, as far as concerns this case, and proceeded to carry on with the same notice and purpose, adopting the plans and results of its predecessor." The court's finding is fully supported by the record (See respondent's brief 34-36 and citations there given and see F. R. 549-550, 635-637, 673-675; 540-542, 545, 546).

Petitioner on page 15 of its brief contends that it should not be referred to as a complainant. When it was made an ancillary party it was made a co-complainant and therefore reference to trustees and petitioner as complainants as made in respondent's brief are appropriate and accurate. It is designated as a complainant in the narrative statement. John A. Thompson president of Phoenix was called as a witness and testified on the side of complainants in the main case (F. R. 531, 538).

Petitioner on page 16 of its reply brief states "respondent states (without record references): 'That said John A. Thompson, as shown by the evidence, moved said records to Florida.' This is a most unfair insinuation and is contrary to the fact." The citation for respondent's statement precedes the statement on page 53 of its brief (Verified answer to petition for rehearing, F. R. 394-398). Petitioner's statement is without record citation and without foundation.

Emory H. English, vice-president of the Phoenix Finance Corporation, testified the books were in Florida; were not in Des-Moines during 1934 to his knowledge unless Mr. Thompson may have had some of the books with him on some trip and carried it back; that he never saw it. The order for production was made April 24, 1934, and directed production within ten days. English testified he couldn't produce the books. They were under Thompson's (Phoenix' president) control (F. R. 613-615 and 97-98).

The court's finding in its ruling on petition for rehearing that the books were not produced is fully sustained by the record, as shown in respondent's brief note

8, pages 60-62, and record citations there given, and note 14, page 79.

Petitioner asserts on page 18 of its reply brief that it did not have notice of nor opportunity to answer the charge in respondent's and interveners' answer to petition for rehearing and modification of decree that the books were not produced and that it orally resisted the charge is not supported by the record nor is any record citation given for it. Respondent and interveners' answer to petition for rehearing supported by affidavit was filed of record February 18, 1937 (F. R. 394-410, filing date 410).

Petitioner Phoenix could have filed a denial of any matter contained in respondent's answer at that time if it had thought there was any basis for it or could have dictated such denial into the record, or asked the court for additional time to file it. The record shows that Phoenix did neither. The hearing was had on the 17th day of February, 1937, and the matter submitted and taken under advisement and on the 4th day of March, 1937, the court rendered its opinion and ruling (F. R. 411-413).

Petitioner's president John A. Thompson was present at the trial and a witness for complainants. He knew that the books of the Phoenix Finance Corporation and its predecessor Phoenix Finance System, Inc., were called for in the taking of the depositions and at the trial and that he could have produced them in evidence. English had testified that the books of Phoenix Finance Corporation were not available and Phoenix officers obviously knew at the time of the hearing on the petition for rehearing that it could not deny the nonproduction without running the risk of subjecting one of its officers to the charge of perjury.

In face of this record and the record cited in respondent's brief note 8, pages 60-62, and note 14, page 79, the petitioner has the temerity to make the unfounded statement that respondent's statement "the fact is neither the

books nor entries therefrom were produced" is false. But petitioner has wholly failed to give any record citation to the original record supporting its unwarranted assertion. The claim that the books and entries therefrom were produced was made for the first time in this ancillary proceeding in paragraph 43 of petitioner's unverified answer and counterclaim filed November 27, 1939, which was stricken as in contravention of the record (R. 166, filing date R. 167).

On page 19 of petitioner's brief it refers to paragraph 40 of its answer and counterclaim which was stricken and then avails itself, in violation of the rules of this court, to go outside of the record on the pretended ground that respondent's counsel asked the court without exception to take judicial notice of all the records, papers and files in this cause. This request was made and the records judicially noticed, as well as offered in evidence, but petitioner's counsel must be presumed to know the requirement of rule 75 of the rules of civil procedure requiring parties to file their respective designations as to what is to be included in the printed record, and that the appellant first files its designation and that then the appellee can designate such additional portions of the record as appellee deems material in view of appellants' designations. Petitioner had full opportunity to designate any part of the record that it deemed material and it did not designate any part thereof for its present outside of the record assertions, obviously knowing that respondent could also make designations and that the record would not bear the construction petitioner seeks to place upon it.

At page 23 of its reply brief petitioner asserts that the finding that the $50,000 mortgage was fraudulent and without consideration was based on "successful legerdemain by counsel for respondent * * * without supporting evidence."

Must it again be stated that the matter of this mortgage was considered by the master, by the trial court, both prior to the original findings and upon petition for rehear-

ing and by the Circuit Court of Appeals and that each found it to be wholly without consideration, fraudulent and void?

To say that in each case counsel for respondent secured a favorable decision without evidence and by sleight of hand is certainly impertinent and verges on contempt. If this assertion deserves notice by this Court, we cite the following record references: Master's finding adopted by the court, F. R. 131; court's opinion, F. R. 171-173; Court's finding 26, F. R. 191-192; Evidence, F. R. 568-586, 585-586, 607-610, 611, 612, 616-617, 642, 677, 678-684, Exhibit B-17 (H. E. B.), F. R. 813, Exhibit B-18 (H. E. B.), F. R. 815, F. R. 902-904; 823-825; 551-554; 627-633; 1531, 1539; 1517; 682-683).

In connection with this testimony there must be kept in mind the testimony which showed that the bridge company had paid $320,000 in stock and $10,000 in cash for the completion of the bridge (F. R. 569, 798-799, 877, 883, 903-904); that the stock had been sold to Thompson & Company and Shaffer & Company held Thompson & Company's note for it, on which there was a balance unpaid of over $92,000 at the time the mortgage was executed (F. R. 662).

Petitioner on page 26 of its reply brief asserts: "At page 105 the respondent's statement that Phoenix in any manner 'took issue' with interveners' charges with respect to the 517 shares of "A" stock is wholly untrue and no record reference being cited therefor, should be ignored." Petitioner in that statement overlooks or ignores that the paragraphs of respondent's brief immediately following the statement pages 105 to 110 state in detail the manner in which petitioner took issue with those charges, giving full record citations (See respondent's brief pages 105 to 110 both inclusive, and citations there given).

The statements on page 26 of petitioner's reply brief are fully answered in respondent's original brief pages 31-36 and 113-116) (Also see F. R. 640-641; 1684; 598; 1527; 545; 681; Ex. Shaffer I F. R. 817; 570-574; 576-577; 817-818; 592-593).

SUMMARY OF ARGUMENT..

Petitioner has failed to show that the findings of the trial court on hearing for permanent injunction, affirmed by the Circuit Court of Appeals, are not fully sustained by the record. Petitioner was represented by the trustees and was an ancillary party in the original proceeding and all the matters involved in the Delaware actions and the mortgage were adjudicated in this case.

Lord Redesdale's rule has no application to the present case. Injunction was properly issued as a writ of assistance under Judicial Code, Section 262. The respondent by the supplemental bill was not seeking to piece-out an incomplete decree and then to enforce it. It sought the benefit of the fruits of the decree affirmed by the Circuit Court of Appeals. The cases cited by petitioner are all cases of consent, *pro confesso,* unexecuted or incomplete decrees. In the case at bar no modification of the decree was sought and the case is not one in which a new trial of the former action can be had.

There was no pleading or proffered evidence of fraud which would justify a re-opening of the decree. Petitioner was not in any manner prevented by respondent from fully presenting its case in the first instance.

The injunction granted is within the well recognized powers of a court of equity and under the facts was proper and necessary to afford adequate relief to respondent and was properly granted to avoid a multiplicity of vexatious and harassing suits and to remove the cloud on respondent's title.

The granting of the injunction did not violate Section 265 of the Judicial Code, but was in harmony with the decisions of the Iowa Supreme Court and of this Court and in accordance with the construction placed on that section by this Court.

Congress has concurred in the construction placed on Section 265 by this Court. While it has had knowledge of such construction and has amended other sections of the Judicial Code, it has not amended this Section.

ARGUMENT.

Petitioner in its original brief and in its reply brief directs its argument against the original findings of fact of the master and of the trial court as though it were arguing this case before the Circuit Court of Appeals on petitioner's first appeal there, wholly unmindful of the fact that it at that time argued all questions with respect to said findings and that that court affirmed the trial court's decision, and that petitioner filed a petition for rehearing before the Circuit Court of Appeals which was denied; and that it then filed a petition for writ of certiorari with this Court which was denied. Petitioner makes the bald assertions in its briefs that the findings and rulings of the trial court on the original hearing are not supported by the record, and then in support thereof merely makes references to its original petition for rehearing before the trial court, and to the portions of its answer and counterclaim re-stating the contents of the original petition for rehearing in slightly modified language, but which were stricken as contravening the record.

The trial court on the hearing on the ancillary bill and petitioner's answer thereto designated "first defense" made findings of fact on the evidence judicially noted and offered at such hearing that all of the matters and items involved in the Delaware actions and in the mortgage were involved in, fully litigated and determined in the original trial of this cause; and that unless petitioner was restrained by the court the respondent (defendant) would be deprived of the fruits and advantages of the judgment decree and orders of the court in this cause and that petitioner (complainant) would continue with vexatious suits in utter disregard thereof, and that the acts of petitioner would cast a cloud over defendant's

title and franchises because of a multiplicity of vexatious suits brought and to be brought against the respondent (defendant) and that it would be damaged in a way that could not be repaired or estimated at common law and that from these threatened wrongs the defendants had no adequate remedy at law, and that the only remedy was in equity (R. 700-722). The petitioner has wholly failed to show that any of such findings of the trial court are not supported by the record nor that the fact statements contained in the opinion of the Circuit Court of Appeals affirming the decree of permanent injunction are not fully supported by the record (See respondent's brief 88-127; petitioner's brief 24-41; petitioner's reply brief 23-26).

The petitioner has cited the decision of the Delaware Court as a matter of argument and we have replied to it as such. The question before the Court is the correctness of the decree of the trial court on permanent injunction, which is controlled by the decisions of the Iowa Supreme Court and of this Court, and the respondent has cited such decisions in its original brief pages 128-200.

The argument of petitioner in the original brief, repeated in its reply brief (pages 44-49), that the adjudications of Phoenix' claims against the bridge company and the bridge company's claims against Phoenix were not within the issues of the original bill and that there was no prayer as to Phoenix entirely disregards the actual pleadings. There was a prayer by complainants that brought into issue all the questions of consideration. Not only did the trustees ask for an adjudication of the amount due on the bonds and for a deficiency judgment in case the proceeds of a sale be not sufficient to satisfy the decree to be rendered (F. R. 10), as they had the right to ask, but they alleged that all of the bonds secured by the deed of trust had been issued for a good and valuable consideration and were outstanding in the hands of divers

persons and corporations who were the owners and holders thereof for value (F. R. 6). And Phoenix in its answer to the petition of intervention alleged that it was the owner and holder for value of a large amount of bonds issued in accordance with the mortgage declared on in the bill of foreclosure, asked that its rights as a holder of bonds be fully protected, and prayed for general relief (F. R. 91-92).

These allegations were all put in issue by the answer of the defendant and by the petition of intervention as has been pointed out in respondent's original brief at pages 25-33.

Before the trustees could have been entitled to a decree, the issues as to consideration must necessarily, under the pleadings, have been litigated and determined favorably to them and to the bondholders they represented and particularly Phoenix, which concededly owned 90% of the bonds and was an ancillary party. Had those and the other issues been determined favorably to the trustees and to Phoenix not only would a decree of foreclosure have been entered, but if after sale there had been a deficiency the trustees would have been entitled to collect the deficiency on execution for the benefit of Phoenix and the minor bondholders. Certainly petitioner will not claim that if the determination had been favorable to the trustees and to Phoenix and a sale of the property had been had with a resultant large deficiency respondent could have come in and resisted collection of the deficiency on the ground that the action was purely an action *in rem*, such as *Federal Land Bank of Omaha* v. *Jefferson et al.*, 295 N. W. 855, cited in petitioner's reply brief (page 45), where the prayer was that "the judgment be *in rem* only" and that therefore it was not proper for the court to enter a judgment for the deficiency. While in the instant case the prayer of complainants was for a deficiency judgment and for general equitable relief and the Phoenix' answer to the petition of intervention also

contained a prayer that its rights as a holder of bonds be fully protected and for general equitable relief. Certainly it cannot be said that a determination in favor of one party is without the issues if it is obvious that a contrary determination would have been within the issues.

Petioner's assertion on page 47 of its reply brief that interveners' pleadings related only to Phoenix Finance System, Inc., and not to it, is inaccurate. All the pleadings filed in this action applied to it; it was the holder of 90% of the bonds when the action was instituted and the pleadings applied to it as fully and completely as though the petition of intervention had been amended, inserting its name therein in lieu of that of Phoenix Finance System, Inc. (See respondent's brief pages 33 and 34 note 5 page 34, and authorities cited pages 131-144).

All the claimed underlying considerations of Phoenix for bonds held by it (now involved in the Delaware actions and in the mortgage) were put forward by the petitioner as claimed considerations for such bonds, placed in issue and investigated and litigated to the minutest detail and to the fullest extent and determined and cannot now be re-litigated (See references in respondent's original brief pages 37-40, and 88-125; see also Phoenix' exceptions to report of special master F. R. Supp. 23-58).

Petitioner's assertion on page 49 of its reply brief that the matter in regard to the 517 shares of preferred stock litigated in this cause concerned the internal affairs of the Delaware corporation and was not within the jurisdiction of the Federal Court is erroneous and petitioner's statement referring to its brief pages 80-83 "the respondent has made no attempt to answer this section of petitioner's brief" is inaccurate. Petitioner overlooks or ignores pages 169-179 of respondent's brief which answers petitioner's contentions.

Petitioner on page 49 of its reply brief asserts "Under the doctrine of the Thomas case, petitioner contends, however, that it is entitled to recover in courts of competent

jurisdiction its entire advances to the bridge company of $98,346 plus interest." This repetition of pages 43-44 of petitioner's brief is answered at page 52 of respondent's brief. The Thomas case cited in respondent's brief at pages 142 and 155 does not support petitioner's contentions.

Petitioner on page 50 of its reply brief refers to its contentions in point 6 of its brief pages 90-95. Those contentions have been fully answered in respondent's brief pages 197-200. Also see *Stewart* v. *Dunham*, 115 U. S. 61, where it is held:

> "After a United States Court has assumed jurisdiction by reason of the litigants being residents of different states, the admission of new parties, as co-complainants, who are residents of the same state as the defendants, does not oust the United States Court of jurisdiction."

And see *Supreme Tribe of Ben Hur* v. *Cauble et al.*, 255 U. S. 356. The latter case involved a class suit which was commenced by citizens of Kentucky and other states outside of Indiana in the Federal Court of Indiana against a fraternal society, a resident of the latter state. Thereafter certain residents of Indiana, members of the class, commenced actions in the state courts in which they sought to re-litigate questions which had been determined in favor of the defendant in the suit in the Federal Court. An ancillary bill was filed in the Federal Court seeking to enjoin the maintenance and prosecution of the actions in the state courts. The lower court dismissed the bill on the ground that members of the society residing in Indiana could not be bound by representation in a class suit if their presence would have ousted the jurisdiction of the Federal Court in the main case, and therefore that the decree was not *res judicata* as to them, which is identical with the claim of Phoenix here. This court held, following *Stewart* v. *Dunham*, *supra*, that since Indiana citizens were of the class represented and diversity of

citizenship having given the court jurisdiction in the first instance the intervention of such Indiana citizens would not have defeated the jurisdiction already acquired and that the members of the class to which the Indiana citizens belonged were concluded by the decree of the district court and an ancillary bill might be prosecuted in the same court to protect that decree by injunction.

Petitioner in its reply brief at pages 50-51 pretends to state what is stated in respondent's brief: "In respondent's brief (pages 197-200) the petitioner's authorities are attempted to be distinguished because, says respondent (page 199):

> (a) It appeared in those cases that there was a substantial and indispensable interest held by a party not a party to the record, or
>
> (b) The cases appeared to be those in which the introduction of an indispensable party, holding an interest in the lawsuit, ousted jurisdiction.
>
> *Both (a) and (b) are exactly the case sub judice.*"

But that is not what respondent stated in its brief. It stated the following (199), the italicized portions of which are conveniently omitted by petitioner, to-wit:

> "The cases cited by petitioner are all cases in which
>
> (a) It appeared from the complaint or answer filed that there was a substantial and indispensable interest *in the lawsuit owned and* held by a party not a party to the record *and that adjudication could not be made of the controversy presented without the presence of such party unrepresented in the pending litigation;* or
>
> (b) Cases in which the introduction of an indispensable party holding an interest in the lawsuit, *wholly unrepresented,* ousted the jurisdiction of the court."

Petitioner evidently recognizes the force of the fact that it was represented by the trustees and was also made an ancillary party.

LORD REDESDALE'S RULE HAS NO APPLICATION TO THE PRESENT CASE.

This matter is we believe sufficiently covered by the original brief pages 200-204, but in view of the insistence of petitioner and his repeated assertions with respect to it we submit in addition the following:

The petitioner on page 7 of its reply brief states: "The obvious purpose of the stricken portions of petitioner's answer and counterclaim was to challenge the foreclosure decree as 'wrong' under Lord Redesdale's rule." With reference to the stricken portions of the answer the trial court in its order striking the same stated that the petitioner "is clearly endeavoring to re-litigate questions of law and fact which were litigated and opportunity given to litigate on the trial of the principal case, in which trial and decison all accounts, indebtedness and matters entered into the consideration of the issue of each and all of the bonds secured by the mortgage sought to be foreclosed were in question, and were considered and determined" (R. 171-172). Petitioner assumes throughout its reply argument that it is entitled to relitigate what has been previously determined. If petitioner's position were correct, then all a litigant would need to do with respect to final adverse decisions rendered by the court would be not to perform them and to pay no attention to them and then if an ancillary proceeding be brought to compel obedience merely claim the right to try the whole case over again, and if that might be done once of course it might be carried on *ad infinitum*, and the decisions of the trial court rendered ineffectual and appellate procedure rendered wholly superfluous.

Judicial Code, Section 262, U. S. C. A., Section 377, provides:

> "Power to Issue Writs. The Supreme Court and the District Court shall have power to issue writs of

scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

The trial court exercising its power under this section entered the permanent decree of injunction to enforce its decree and to preserve the fruits thereof to the respondent.

In *Root* v. *Woolworth*, 150 U. S. 401, this court said:

> "It is well settled that a court of equity has jurisdiction to carry into effect its own orders, decrees and judgments which remain unreversed, when the subject matter and parties are the same in both proceedings. * * *
>
> "The jurisdiction of courts of equity to interfere and effectuate their own decrees by injunction or writs of assistance in order to avoid the re-litigation of questions once settled between the same parties is well settled. * * *
>
> "The power of the court to issue the judicial writ or to make the order and enforce the same by a writ of assistance, rests upon the obvious principle that the power of the court to afford a remedy must be co-extensive with its jurisdiction over the subject matter. Where the court possesses jurisdiction to make a decree it possesses the power to enforce its execution."

An ancillary bill is but the continuation in a court of equity of the original suit, to the end that justice may be accomplished thereby.

> *Campbell* v. *Golden Cycle Mining Co.*, (8 C. C. A.) 73 C. C. A. 260, 141 Fed. 610, 612.

The ancillary proceedings in the instant case is not a new case, but a continuation of the original case to enforce the decree of the court and preserve the fruits of that decree.

The above quoted statute provides for writs of assistance and it cannot well be said that whenever such a writ of assistance is asked the whole case is to be tried over again at the suggestion of the party against whom the decree is rendered. If such were the case the suggestion might as well be made the morning after the rendition of the decree as later. Respondent is seeking to enforce the decree rendered. As stated in the opinion of the Circuit Court of Appeals: "The bridge company is not seeking to piece out an incomplete decree and then to enforce it. All that is sought here is the benefit of the fruits of a decree affirmed by this court. That decree is conclusively presumed to be correct. If it were otherwise there could be no end to litigation, the rule of the finality of judgments would have no efficacy, and the doctrine of *res judicata* would be annulled" (R. 784). The ancillary bill discloses that the statement of the Circuit Court of Appeals is fully sustained by the record (R. 3 to 100).

O'Brien v. *Wheelock*, 184 U. S. 450, cited by petitioner, bears no similarity to the instant case. Relief was denied on the ground of laches. The supplemental bill brought in parties who were not parties to the original bill. The court said "It was an original bill as to these new parties and they were entitled to all of the defenses which existed when it was filed."

Lewers & Cooke v. *Atcherly*, 222 U. S. 285, cited by petitioner, involved an unexecuted decree, and the case had not passed to final decree.

As to the case of *Gay* v. *Parpart*, 106 U. S. 679, cited by petitioner, this court said in *Harding* v. *Harding*, 198 U. S. 317, 335, that it "dealt merely with the right of a court of equity to refuse to lend its aid to enforce an incomplete and ineffective decree in partition proceedings because to do so would be inequitable."

Petitioner refers to *Wadhams* v. *Gay*, 73 Ill. 415, in its brief, but the Illinois Court in the later case of *Hultberg* v. *Anderson*, 252 Ill. 607, 97 N. E. 216, 220, writ of error dismissed 238 U. S. 605, said:

> "But this rule has no application to decrees that are complete and perfect and free from any inherent defect which prevents their execution."

In *American Radium Co.* v. *Hipp*, 279 Fed. 601, cited by petitioner, a consent decree in a prior case had been entered. The court said:

> "But now a different plaintiff appeals to a court of equity to piece out the decree and give to it a valuable right; *i. e.*, an accounting, which was not accorded to Junghams nor reserved by him for his assigns."

The rule for which petitioner contends has no application. No modification of the decree was sought. *Utah Power & Light Co.* v. *U. S.*, (Court of Claims) 42 F. 2d 304, at 308.

Petitioner's contention that the respondent sought to "piece out" and enlarge an incomplete decree and then to enforce it is not supported by the record. When the court made its decree dismissing the bill of plaintiffs as to the Phoenix Finance Corporation and denying the prayer of the bill, it adjudicated every question involved in the litigation adversely to petitioner and its representatives, the trustees. *Hickey* v. *Johnson*, (8 C. C. A.) 9 F. 2d 498, 501. This included, as has been pointed out, all of the matters and items involved in the Delaware cases and in the mortgage which was held fraudulent and without consideration and void.

The findings of fact, having gone into the decree, are conclusive as to the facts found. Every defense requiring the negation of any of such facts is met and overthrown by the adjudication. The opinion is part of the record and may be looked to as to what was in issue and

determined by the decree. *Last Chance Mining Co.* v. *Tyler Mining Co.*, 157 U. S. 683, 690-691; *Mason Lumber Co.* v. *Bechtel*, 101 U. S. 638, 11 Otto 638.

The record shows that the opinion and findings of fact (F. R. 156-202) were filed with the decree. The decree says (F. R. 202):

> "The above entitled cause came before the Court on the first day of December, 1936, it being the first day of the December, 1936, term of this Court, for the filing of Opinion ruling upon exceptions to the Master's Report, taking final submission of the cause upon the Master's Report and his advisory findings and the evidence in the cause, and the entry of a final decree."

Petitioner, in its petition for rehearing and modification of decree, asked in the alternative that there be withheld from the adjudication the mortgage, reserving to the petitioner the right to litigate such mortgage in another case if it desired, that it be reinvested with the stock, and that the decree be modified to withhold from adjudication the right of petitioner to institute actions at law against the bridge company if it so desired for money had and received (F. R. 223). This was overruled (F. R. 411 to 413). This constituted a further adjudication. *Spencer* v. *Watkins*, (8 C. C. A.) 169 Fed. 378, Cert. Den. 215 U. S. 605; *American Surety Company* v. *Baldwin*, 287 U. S. 156. The Circuit Court of Appeals had also rendered its decision determining the matters herein involved.

In *Root* v. *Woolworth*, 150 U. S. 401, this court said:

> "When the court adjudges a title to either real or personal property to be in one as against another, it enforces its judgment by giving the enjoyment of the right to the party in whose favor it has been decided." That is what the Court did in the instant case.

FURTHER ANSWER TO PETITIONER'S POINT NINE.

There was nothing in the stricken portions of petitioner's answer and counter claim nor in offer of proof justifying a reopening or a re-examination of the case.

The decree was not by consent or *pro confesso* but one entered after every issue had been fully litigated and the decree was in no way incomplete or defective. An analysis of the answer and counter claim and of the offer of proof made by petitioner makes it very clear that they furnished no justification for a reopening or a reexamination of the case.

After the order of the court striking certain matter from the answer and counter claim (R. 171) there was left the first defense except a small part, and by the admissions and denials of that defense, all the *issues tendered* by the supplemental and ancillary bill and the amendment thereto were either admitted or put in issue (R. 147-151) (See original brief 18-25).

The alleged defenses 2 to 7, being paragraphs 13-45 of petitioner's answer and counter claim (R. 151-167), were properly stricken. Petitioner at page 7 of its reply brief admits that those portions of the answer were for the obvious purpose of challenging the foreclosure decree as "wrong."

The offers of proof made by petitioner on the trial of the injunction proceeding merely amount to elaborations of the matters set out in those portions of the answer which were stricken and, which have been commented upon and amount to nothing more than an attempted relitigation of the issues determined in the main case (see original brief 77-88 and notes on said pages).

The claims of petitioner of alleged fraud and of its asserted right to relitigate the question of considerations

are concisely stated in the opinion of the Circuit Court of Appeals, R. 784-787.

Petitioner, in its original brief (pages 104-105), summarizes these claims as follows: "(1) because of understanding, following approved Federal practice, with respect to the two-stage theory, by reason whereof Phoenix was prevented from offering its evidence, (2) because it was denied relief on petition for modification of the Foreclosure decree because of false representations of opposing counsel accepted by the Court with respect to its alleged failure to produce books as ordered, and (3) because of the circumstances of extrinsic fraud stated in stricken paragraph 44 of its Answer and Counterclaim."

As to petitioner's claim of some understanding with reference to so-called "two-stage theory," there was no such understanding or misunderstanding (*Spears Sand and Gravel Works* v. *American Trust Co* (4 C. C. A.) 20 F. 2d 333, 336). The cause, by agreement of parties, was referred to the Master in its entirety (F. R. 107-108). At the conclusion of the evidence, the Master fixed time for filing of briefs and stated: "I would like to have the theory of all parties definitely in reference to the consideration" (F. R. 693). The entire matter was submitted to the Master for decision at one time (F. R. 694-695).

Petitioner filed exceptions to the Master's report which were adopted by the trustees (F. R. Supp. 14-58 and Page 7). Petitioner then filed petition for rehearing adopted by trustees, in which the same so-called "two-stage" theory and alleged understanding was asserted (F. R. 216-233 and 214). An answer thereto was filed by respondent bridge company and interveners denying that there was any misunderstanding (F. R. 394 to 398). The petition for rehearing and modification of decree were overruled (F. R. 411-415). This ruling was affirmed (F. R. 1707). It had been previously adjudicated that there was no misunderstanding. See respondent's brief pages 40-42, 49-59, 179, 180. This claim of petitioner furnished

no basis for setting aside the decree and re-opening the case.

Pittsburgh Reduction Co. v. *Cowles Elec. S. & A. Co.*, (C. C. N. D. Ohio) 64 Fed. 125, 127.

As to the claims of false misrepresentations of opposing counsel with respect to the failure of petitioner to produce books as ordered on hearing of petition for rehearing and modification of decree, the facts with reference to the non-production of such books have been fully discussed and record citations given in petitioner's original brief pages 59-60 and Note 8 pages 60-62 and *supra* of this supplemental brief, pages 9 to 11. Petitioner had full opportunity to present anything it wanted to with respect to this pretended claim on the original hearing. This claim, made for the first time in this ancillary proceeding in contravention of the record, furnished no basis for setting aside the decree and re-opening the case.

As to the allegations of Paragraph 44 of petitioner's Answer (R. 166-167), these are fully discussed in the note relating to that paragraph appearing at pages 20-21 in respondent's brief, and the facts attempted to be pleaded do not constitute fraud, and are wholly insufficient to furnish any basis for setting aside the decree and opening the case.

Southern Pacific R. R. Co. et al. v. *U. S.*, 168 U. S. 1.

Abel v. *Partello*, 202 Iowa 1236, 211 N. W. 868.

Graves v. *Graves*, 132 Iowa 199, at 204.

There is nothing in the opinion in the case of *U. S.* v. *Throckmorton*, 8 Otto 61-71, 98 U. S. 61, which justifies petitioner's statement that it is only where a party is seeking to have affirmatively a judgment or decree set aside on the grounds of fraud, that the alleged fraud must be extrinsic to the issues, and that that rule does not apply where a party is defending against the enforcement of a judgment or decree.

The case of *Chicago, R. I. & P. Ry. Co.* v. *Calcotte,* (C. C. A. 8) 267 Fed. 799, cited by petitioner is no authority for the contention of petitioner, but on the contrary re-affirms the holding of the Throckmorton case that fraud to be available must be extrinsic to the issues which were determined, and that even erroneous and perjured testimony which relates simply to the issue directly contested does not constitute extrinsic fraud.

The rule stated in the Throckmorton case is also the rule in Iowa.

In *Abell* v. *Partello,* 202 Iowa 1236, 211 N. W. 868, the court said:

> "The rule is settled under our previous cases that the fraud of which a court will take cognizance in an equitable proceeding to vacate judgment or decree after the expiration of one year must be such as was collateral to the proceeding and issues in the original case. The fraud charged cannot be predicated upon a conflict of evidence in the trial, nor even upon perjury committed therein. The relative weight of evidence and all charges and countercharges of perjury are deemed as necessarily adjudicated in the original proceeding" (Citing cases including the Throckmorton case).

Also see:

> *Toledo Scales Co.* v. *Computing Scales Co.*, 261 U. S. 399, 43 Sup. Ct. Rep. 458.

The propriety of the rule in the Throckmorton case is apparent. If it were not for that rule, any unscrupulous litigant, after being unsuccessful in the litigation, could make false statements as to what occurred before the court and present those as a basis for setting aside the court's decree, although the court would know that the matters thus stated did not occur in the trial. It would open the door for fabrication and falsehood.

Petitioner, on page 104 of its brief, quotes from the Throckmorton case the words: "Where the unsuccess-

ful party has been prevented from exhibiting fully his case by fraud or deception on him by his opponent," and then claims that it falls within that language. Petitioner ridiculously assumes in its assertions that the Master, Hon. J. W. Kindig, a former Justice of the Supreme Court of Iowa (Iowa Supreme Court reports, of which this Court takes judicial notice), and Hon. Geo. C. Scott, Judge of the Federal Court for the Northern District of Iowa, could be induced to make findings of fact and decree and rulings by mere misrepresentations of the evidence in the case although the record shows that they spent months in reviewing the case and the Master's report and the court's opinion, findings and rulings show on their face the care and thought that they devoted to the determination of the case, and are a complete refutation of the unwarranted statements of the respondent. Petitioner also seems wholly oblivious to the fact that this record was fully reviewed by the Circuit Court of Appeals.

It must be noted that petitioner's claims as to misrepresentation first made their appearance over two years later in this ancillary proceeding when petitioner was called upon to obey the decrees of the court. Petitioner and trustees were represented by able counsel, both in the trial court and in the Circuit Court of Appeals, and the petitioner availed itself of every opportunity to fully present its side of the case as shown by the record. The record shows that intervener's counsel stated very pointedly, and in terms that could not be misunderstood, that the whole case was being tried and submitted (R. 694-695). There was nothing to prevent the petitioner from bringing its books and the books of its predecessor and placing them in evidence, excepting its own unwillingness to do so. It could subpoena and call any witnesses that it wanted to and it exercised its own judgment with respect thereto. It had a full, fair trial and its assertion that the respondent or interveners prevented it from exhibiting fully its case is without foundation.

Embry, Adm'r, etc., v. *Palmer et al.*, 107 U. S. 3, 2 Sup. Ct. Rep. 25.

Toledo Scales Co. v. *Computing Scales Co.*, 261 U. S. 399, 43 Sup. Ct. Rep. 458.

FURTHER ANSWER TO PETITIONER'S POINT THREE.

The injunction granted here was within the well recognized powers of a court of equity and under the facts and situation was proper and necessary to afford adequate relief to respondent.

The jurisdiction of courts of equity to intervene and effectuate their own decrees by injunction in order to avoid the re-litigation of questions once settled by the same parties and to prevent vexatious suits is unquestioned.

The facts and situation in this case make it one calling for the granting of equitable relief.

The argument on these propositions in the original brief appears at pages 181-187.

See, also, Pomeroy, Equitable Remedies (2d Ed.), Sec. 367.

This case was originally started by the filing of a bill August 28th, 1933, and the court's opinion, findings of fact, conclusions of law and final decree were entered on December 1st, 1936 (F. R. 12, 179, 202, 204). The Circuit Court of Appeals rendered its opinion on August 8, 1938 (F. R. 1689). After five years of struggle by the parties this court denied certiorari on December 5, 1938 (305 U. S. 650).

The language of Mr. Justice Brewer in *Riverdale Cotton Mills* v. *Alabama-Georgia Mfg. Co.*, (1905) 198 U. S. 188, 195, might almost be paraphrased in this case. That suit involved a mortgage foreclosure suit in the federal court in which a sale had been made and an attempt was later made by bondholders to institute separate proceedings in the state court. Quoting from the opinion:

> "For over ten years from January 21, 1891, the date of the filing of the original bill, litigation was carried on in the Circuit Court of the United States for the Northern District of Georgia and in Appellate Courts, in the foreclosure of a trust deed executed by the Alabama & Georgia Manufacturing Company. In the course of that litigation decrees were entered and reviewed, sales were made and set aside, possession of property was transferred and retransferred, accountings had of the proceeds of property in possession, and when it seemed that at last litigation was at an end, the foreclosure consummated and the title established in the purchaser, we are told that it all amounted to nothing; that parties, lawyers and courts have been spending their time and labor in simply batting the air. The jurisdiction of courts of equity to intervene and effectuate their own decrees by injunction or writs of assistance in order to avoid the relitigation of questions once settled by the same parties is well settled."

The facts in this case also pointedly presented the ground for equitable relief to prevent a multiplicity of suits and of harassing and vexatious litigation.

The petitioner on September 23, 1938, had petitioned the Circuit Court of Appeals for a stay of mandate on its original decision (F. R. 1716), which stay was granted on October 3, 1938 (F. R. 1717). The petitioner had filed one action at law in Delaware on September 29, 1938, while its petition for stay of mandate was pending and before its petition for certiorari had been filed and decided in this court (Ex. SC-1 R. 294-300) (305 U. S. 650). Petitioner had filed an action in equity in Delaware on February 18, 1939 (Ex. SC-2 R. 301-306), and it had filed another action at law in Delaware with summons returnable September 18, 1939 (Ex. SC-3 R. 307-319), and had filed a fourth action at law in Delaware with summons returnable September 18, 1939 (Ex. SC-4 R. 320-339), and had filed a fifth action at law in Delaware with summons returnable September 18, 1939 (Ex. SC-5 R. 340-378), and

on June 2, 1939, had recorded the mortgage held fraudulent in the original decree (Exs. SC-6 and SC-7 R. 374-384).

Respondent with leave of court on the 18th day of September, 1939, filed a supplemental and ancillary bill for temporary and permanent injunction (R. 2, 12). Petitioner having been served with notice of motion for leave to file the ancillary bill appeared thereto on September 18, 1939 (R. 2, 101). And on September 18, 1939, an order was entered fixing September 28, 1939, for hearing on motion for temporary injunction (R. 101). Amendment to ancillary bill was filed September 28, 1939 (R. 98-100). On September 28, 1939, petitioner filed resistance to hearing for temporary injunction (R. 112-117). Temporary injunction was granted October 7, 1939 (R. 120-140, filing date R. 140). Hearing on ancillary bill for permanent injunction was had March 11, 1940, and the matter fully submitted (R. 257, 293). And on March 23, 1940, the court entered its findings of fact, conclusions of law, opinion and final decree of permanent injunction (R. 700-722). It found that the matters involved in the Delaware actions and in the mortgage had been previously determined in this action, and the original decree should have ended the matter. Petitioner not having been content to leave the matter closed, having commenced the series of Delaware suits here involved and having recorded the mortgage which had been held to be invalid, without consideration and void, the federal district court as a court of equity having jurisdiction of the parties and of the subject matter was, when asked to issue an injunction to protect its own judgment and decree, entitled to consider in determining whether there was equity in the ancillary bill, whether or not a multiplicity of suits and vexatious and harassing litigation would not be thus prevented. The court did so find (Finding 13, R. 713).

This case involves the issue whether the matters involved in the Delaware suits and in the mortgage were

determined in this cause. This question arises in each of the Delaware suits. This case is within the classification adopted by Pomeroy, which he states as the case where "dispute is between two individuals, A and B, and B institutes or is about to institute a number of actions, either successively or simultaneously, against A, all depending upon the same legal questions and similar issues of fact, and A by a single equitable suit seeks to bring them all within the scope and effect of one judicial determination." Pomeroy, Equity Jurisprudence (4th Ed.), Vol. I, Sec. 245.

The opinion, findings and permanent decree of the trial court, affirmed by the Circuit Court of Appeals, have determined this whole matter in one ancillary proceeding, if affirmed by this court.

In addition to the facts of equitable consideration stated in respondent's brief pages 182-187, we want to further call the court's attention to the inequitable hardship that would be imposed upon respondent to permit the Delaware actions to be further prosecuted.

The record on the original trial of this cause is very voluminous, as will be noted from the printed record which was before the Circuit Court of Appeals on the first appeal. To present this voluminous record in the Delaware cases by certified, exemplified copies of the depositions, transcripts and exhibits would involve enormous expense, yet in view of petitioner's readiness to dispute the record it would probably be necessary to do so. It might also be necessary to prosecute an appeal in each of the cases to the Delaware Supreme Court which would require a printing of the record in each case at large expense and it might involve five petitions for writ of certiorari to this court, which under the rules of this court would require the printing and filing of forty copies of record in each case at great expense. It would involve trials in Delaware, over 1,000 miles away from where the bridge company's business and properties are located, at great expense as has been pointed out on pages 183-184 of

respondent's brief. All this we submit would be very inequitable to the respondent who has already successfully defended itself against the fraudulent claims of the petitioner in the federal court where the complainants chose to bring this action.

As stated by Pomeroy:

> "The court will interfere and restrain the defendant's further prosecution of successive actions at law, and will thus establish and quiet the plaintiff's right, when all the questions of law and fact involved in these actions have already been fully determined in the plaintiff's favor by some former judicial proceeding between the same parties."
>
> Pomeroy, Equity Jurisprudence (4th Ed.), Vol. I, Sec. 253.

A clear class of cases in which injunction is granted is composed of those in which such injunction is granted to suppress undue and vexatious litigation.

See Story on Equity Jurisprudence (14th Ed.), Sec. 1226.

See respondent's original brief pp. 182-187.

An inadequacy of legal remedy exists where one is bound to litigate a multiplicity of suits having a community of facts and issues. Avoidance of the burden of numerous suits at law between the same parties where the issues are substantially the same is a recognized ground for equitable relief in the federal courts.

Kessler v. *Eldred*, 206 U. S. 285.

Di Giovanni v. *Camden Fire Ins. Ass'n*, 296 U. S. 64.

Sovereign Camp W. O. W. v. *O'Neill et al.*, 266 U. S. 292.

Petitioner's disdain and want of respect for the courts is well illustrated in a letter of John A. Thompson of November 23, 1938, to the stockholders of the bridge company: "I am not asking you or any other man to help

me or to help Phoenix; Phoenix does not need any help in its fight to maintain its creditor position. In the end the facts will all be proved in competent courts. I am not a bit disturbed about the outcome, etc." And in a letter to a stockholder and director of the bridge company of June 12, 1939: "It makes little difference whether the bridge company pays the debt by reason of a mortgage foreclosure or by way of a judgment and execution against the bridge" (Court's finding 11, R. 711-12).

FURTHER ANSWER TO PETITIONER'S POINT FOUR.

The granting of the injunction involved in this case did not violate Section 265 of the Judicial Code (Act of March 2, 1793, C. 22, Sec. 5, 1 Stat. L. 334, R. S., Sec. 720, 28 U. S. C. 379), but was in accord with the spirit of that section and the consistent construction of it by this court.

In addition to the argument in respondent's original brief on this point pages 188-197 respondent respectfully submits the following:

If this case had been tried originally in the state court of Iowa and subsequently an ancillary bill filed to prevent the re-litigation in a foreign jurisdiction of the matter determined and to enforce the decree and to preserve the fruits thereof the Iowa court would have rendered the injunction decree which the federal court rendered in the instant case in accordance with the holding of the Iowa Supreme Court in the case of *Oates* v. *Morningside College*, (1934) 217 Iowa 1059, 252 N. W. 783. Such is the law of Iowa. We submit that the Oates case is an exact parallel of this case.

Section 34 of the Federal Judiciary Act of September 24, 1789, c. 20, 28 U. S. C., Sec. 725, 28 U. S. C. A., Sec. 725, provides:

> "The laws of the several States except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

In *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, this court held that the phrase "laws of the several States" as used in the statute just quoted includes not only statutory law but also the state decisions and that a case tried in the federal court is to be determined in accordance with the laws of the state where the case is tried.

The statute contains "shall be regarded as rules of decision in trials at common law in the courts of the United States." How could a federal court carry that out if it were shorn of its power to make effectual its decree and orders to preserve the fruits thereof? Would it not be rendered impotent to do the very thing that this statute contemplates that the federal court shall do?

The decision in the Erie R. R. case contemplates that the same rules of law shall apply and the same relief be granted whether the case be tried in the state court or in the federal court. If Section 265 were to be now construed as prohibiting a federal court to enforce its decrees and to preserve the fruits thereof by injunction the objects intended to be accomplished by the decision in the Erie case would be frustrated. Immediately a situation would be presented where parties fraudulently inclined could commence their actions in the federal court, try them to final determination, and if defeated treat the whole thing as nugatory and proceed anew elsewhere, and if successful the defendant would be bound.

Such a construction would also render meaningless the words of this Court in *Root* v. *Woolworth*, 150 U. S. 401:

> "Where the court possesses jurisdiction to make a decree it possesses the power to enforce its execution."

And would involve an overruling of this Court's decision in the case of *Local Loan Company* v. *Hunt*, 292 U. S. 234, which we submit is an exact parallel of the instant case.

We contend that Judicial Code, Section 265, must be construed in the light of the above quoted statute and in the light of Judicial Code, Section 262 (U. S. C. A. Sec. 377), and when so construed it is apparent that it was never intended to prevent the federal court from enforcing its decrees and preserving the fruits thereof and preventing the re-litigation of the same matters between the same parties once determined by the federal court.

We contend that the prohibition of Section 265 was intended to apply to cases first commenced in the state court and not to cases already fully tried and determined by a federal court sitting as a court of equity.

In *Julian* v. *Central Trust Company*, 193 U. S. 93, where after suit in the federal court for foreclosure of mortgage resulting in decree, sale, confirmation and delivery of possession to the purchaser, it was attempted to subject the property to judgments rendered in the state court against mortgagor on causes of action arising subsequent to confirmation of foreclosure sale, it was held that the federal court properly on supplemental bill restrained enforcement of the state court judgments in order to protect the title it had conveyed by foreclosure proceedings. The court said:

> "In such cases where the federal court acts in aid of its own jurisdiction and to render its decree effectual, it may, notwithstanding Section 720, Revised Statutes (Section 265, Judicial Code), restrain all proceedings in a state court which would have the effect of defeating or impairing its jurisdiction."

If Section 265 were to be construed as preventing federal courts from enforcing their decrees by enjoining parties from re-litigating in other courts matters determined in a cause of which the federal court first obtained

jurisdiction of the parties and subject matter, the powers of the federal courts and the effectiveness of their decrees in railway bonds and other foreclosure cases would be greatly impaired. Federal foreclosure sales would not be attended. There simply would not be any purchasers as no one would want to buy anything under a foreclosure decree, the determination of which might at any time be litigated in various courts elsewhere.

Also see *Riverdale Cotton Mills* v. *Alabama Mfg. Co.*, 198 U. S. 188, argued before this Court by Mr. Louis D. (later Mr. Justice) Brandeis.

One of the leading cases is that of *Gunter* v. *Atlantic Coast Line Railroad Company*, 200 U. S. 273, 50 L. Ed. 477, opinion by Mr. Justice White. It appears that the Legislature of South Carolina had exempted the capital stock and property of the Northeastern Railroad Company from all taxation during its charter existence. Some time later a law was passed providing for assessment and taxation of all property in the state. The Cheraw & Darlington Railroad Company, the successor to the Northeastern Railroad Company, was assessed for taxation under this law; thereupon a stockholder of the railroad company filed his bill in the Federal District Court against the railroad company and the county treasurers of the proper counties, praying that the treasurers be enjoined from collecting and the railroad company from paying the taxes. An injunction was granted. This was the original case and is known as the Pegues Case. For twenty-five years no attempt was made to tax the property of the railroad company. Then a new suit was brought against the railroad company alleging that it had been mistakenly treated as having a right to exemption and asking to recover the sum of taxes, penalties and interest for a period of ten years. Thereupon the Atlantic Coast Line Railroad Company, the successor to the Cheraw & Darlington Railroad Company, filed a bill entitled and numbered as of the original cause which had been determined twenty-five

years before, praying that it be protected in the rights and privileges adjudged in that case and be accorded the benefit of the injunction issued, and that the attorney general of the state be enjoined from further prosecuting the actions commenced in the state court.

After having first found that the parties were privies to the decree in the first case, the court went into the question as to whether the decree rendered in the first cause established the exemption embraced in the issues of the case at bar. It was claimed by the attorney general that the original decree in the Pegues case was based upon the assumption that there was consideration for the exemption, and that this was an erroneous assumption by the court and that if the truth had been established, a different decree would have been rendered. The Supreme Court says that all defenses existing at the time of the decree in the Pegues case, whether brought to the attention of the court or waived, were foreclosed by the decree. The court then goes on to discuss whether the lower court erred in granting the relief, and after referring to the statute which is now Section 265 of the Judicial Code, says:

> "The soundness of the doctrine relied upon is undoubted. The difficulty is that the doctrine is inapplicable to this case * * * the right of the court to administer relief—to make its decree effective—cannot be measured by constitutional or statutory provisions relating to original proceedings where jurisdiction over the controversy did not obtain * * * Indeed the provision that the Eleventh Amendment or Section 720 of the Revised Statutes (United States Compiled Statutes, 1901, page 581), control a court of the United States in administering relief, although the court was acting in a matter ancillary to a decree rendered in a cause over which it had jurisdiction, is not open for discussion * * * *And this reasoning disposes of the contention that the court below erred in enforcing its prior decree because there was adequate remedy at law by interposing a defense in the state courts to the actions brought by the at-*

torney general. That question was foreclosed by the decree in the Pegues Case * * * Having acquired by that decree a right which the petitioner was entitled to enforce * * * that rule could not rightly be invoked to deprive the court below as a court of equity of the power to protect the petitioner in the enjoyment of rights previously secured under a decree of the court" (emphasis supplied).

Slaughter v. *Slaughter*, 48 F. 2d 210, Circuit Court of Appeals, Fifth Circuit, opinion by Judge Bryan, petition for writ of certiorari denied 284 U. S. 643, 76 L. Ed. 547. In this case it appears that W. B. Slaughter had been adjudged a bankrupt in 1918. His trustee in bankruptcy filed the original suit against C. C. Slaughter Company and G. G. Wright, to whom, before bankruptcy, he had conveyed all of his property. The trustee's suit sought to recover the property for the benefit of the bankrupt estate. A compromise settlement was made under which the defendants kept the property sued for, but paid $85,000 to the trustee. That settlement was approved and confirmed by the bankruptcy court in a final judgment. Later W. B. Slaughter brought suit against C. C. Slaughter Company and Wright in the District Court of Palo Pinto County for damages and to recover the property that had been awarded to the defendants by the compromise settlement in the bankruptcy court. Slaughter obtained judgment in the state court for the recovery of the property and for $30,000 damages. *This judgment was appealed and reversed, and to prevent a retrial of the suit in the state court, the appellees, C. C. Slaughter* Company and G. G. Wright, filed a supplemental bill in the bankruptcy court to enforce the compromise of March, 1919, praying for an injunction against Slaughter restraining him from prosecuting the suit. Thereafter the bankruptcy court granted a permanent injunction restraining the defendant in the supplementary bill from further prosecuting the suit in the state court. The defendant in the supplemental bill then filed suit in the

federal court, praying, among other things, that the injunction entered in the bankruptcy proceedings be vacated. The lower court refused to vacate the judgment of the bankruptcy court and the Circuit Court of Appeals affirmed the holding of the lower court, saying:

> *"The court fully had the power to protect its own previous decree and in doing so to grant the injunction prayed for in the supplemental bill"* (Emphasis supplied).

In *Wilson* v. *Alexander*, (5th C. C. A.) 276 Fed. 875 the court said:

> *"There can be no doubt of the jurisdiction of the United States Court to entertain proceedings to construe and give full effect to its decree* * * * The right to plead the decree of the federal court in defense to Alexander's suit in the state court is no reason why a resort should not be had to the equitable jurisdiction of the federal court."

Also to the effect that the fact that a plea of *res judicata* has been or may be interposed in a state court is no defense to the granting of injunctive relief by the federal court, see:

> *Local Loan Company* v. *Hunt*, 295 U. S. 234.
> *Oates* v. *Morningside College*, 217 Iowa 1059, 252 N. W. 783, 786.
> *O'Haire* v. *Burns*, 25 Colo. 453, 100 Pac. 755, 757.
> *Kessler* v. *Eldred*, 206 U. S. 285.

In *Hale* v. *Bimco Trading, Inc.*, 306 U. S. 375, this Court said:

> "Appellants are in effect contending that no proceedings are here available to bring the constitutionality of the Florida statute before this Court, once the state court directed its enforcement. The Supreme Court of Florida itself manifested no such strangling conception of Section 265. It did not deem the proceedings initiated below as a denial of the right of way of a state court through an obstructive

exercise of authority by a United States court. On the contrary, in staying 'all further proceedings and actions' until this Court had finally passed upon its constitutionality, the Supreme Court of Florida recognized the propriety of the present proceedings as an orderly mode for invoking the ultimate judicial voice on constitutional issues. Therefore, Section 265 has no relevance here. That provision is an historical mechanism (Act of March 2, 1793, 1 Stat. 334, 335) for achieving harmony in one phase of our complicated federalism by avoiding needless friction between two systems of courts having potential jurisdiction over the same subject-matter. *Wells Fargo & Co.* v. *Taylor*, 254 U. S. 175, 183, 41 S. Ct. 93, 96, 65 L. Ed. 205. The present record presents no occasion for bringing this safeguard into play."

In *Wells Fargo & Co.* v. *Taylor*, 254 U. S. 175, this Court in considering the applicability of Section 265 in that case stated:

"The provision has been in force more than a century and often has been considered by this court. As the decisions show, it is intended to give effect to a familiar rule of comity and like that rule is limited in its field of operation. Within that field it tends to prevent unseemly interference with the orderly disposal of litigation in the state courts and is salutary; but to carry it beyond that field would materially hamper the federal courts in the discharge of duties otherwise plainly cast upon them by the Constitution and the laws of Congress, which of course is not contemplated. As with many other statutory provisions, this one is designed to be in accord with, and not antagonistic to, our dual system of courts. In recognition of this it has come to be settled by repeated decisions and in actual practice that, where the elements of federal and equity jurisdiction are present, the provision does not prevent the federal courts from enjoining the institution in the state courts of proceedings to enforce local statutes which are repugnant to the Constitution of the United States (citing authorities) or prevent them from maintaining and protecting their own jurisdiction, properly acquired and still subsisting, by enjoining attempts to frustrate,

defeat or impair it through proceedings in the state courts (citing authorities), etc."

Also see *Essanay Film Mfg. Co.* v. *Kane*, 258 U. S. 358.

Petitioner cites *Oklahoma Packing Company et al.* v. *Oklahoma Gas & Electric Co. et al.*, 309 U. S. 4. That was a case where a state court first obtained jurisdiction and the facts in that case bear no similarity to the facts in the instant case.

Petitioner cites *Equitable Life Assur. Soc.* v. *Wert*, 102 F. 2d 10. The facts in this case are readily distinguishable from the instant case. The decision in that case was written by Circuit Judge Sanborn, who also heard the present case and concurred in the opinion rendered in this case.

Petitioner cites *Guardian Trust Company* v. *Kansas City Southern Ry. Co.*, (8 C. C. A.) 171 Fed. 43. When that part of the opinion is read preceding petitioner's quotation it will be noted that it has no application to the instant case. In the opinion the court said: "The suit in equity is not upon the same cause of action as any of the actions at law."

In *St. Louis-San Francisco Railway Co.* v. *M'Elvain*, (8 C. C. A.) 253 Fed. 123, the court in an opinion rendered by Sanborn, Circuit Judge, states:

> "A suit in equity, dependent upon an original suit or action of which the federal court had jurisdiction, may be maintained in that court (1) to aid, enjoin, or regulate the original suit; (2) to restrain, avoid, explain, or enforce the judgment or decree therein; (3) to enforce or adjudicate liens upon or claims to property in the custody of the court in the original suit; and (4) to enforce its decree or judgment in the original suit, to prevent the relitigation in other courts of the issues it has heard and adjudged in the original suit, and to protect the titles and rights acquired by purchasers under its decree, or judgment

> from attacks by suit or otherwise, based on the theory that its adjudications in the original suit were illegal and ineffective, and to accomplish these ends the court has the jurisdiction and authority to use its writs of injunction and its writs of assistance."

In *Steelman* v. *All-Continent Corporation*, 301 U. S. 278, in an opinion delivered by Mr. Justice Cardozo this Court said:

> "We are unable to yield assent to the statement of the court below that 'The restraint of a party is legally tantamount to the restraint of the court itself.' The reality of the distinction has been illustrated in a host of cases (Citing numerous authorities)."

As stated by Mr. Justice Reed in *U. S.* v. *American Trucking Ass'n, Inc.*, 310 U. S. 534, 542, in speaking of literal interpretations:

> "When that meaning has led to absurd or fatal results, however, this Court has looked beyond the words to the purpose of the Act. Frequently, however, even when the plain meaning did not propose absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole,' this Court has followed that purpose, rather than the literal words."

It may well be said that Congress has concurred in the construction placed on Section 265 by this Court in cases involving anciliary proceedings to effectuate the decrees of federal courts.

Not only has there been no indication of any public sentiment for a change in such construction, but Congress has at all times had full knowledge of the construction of Section 265 by this Court and the other federal courts and no legislation has been enacted which would indicate that Congress did not fully concur with the judicial interpretation of that section.

To meet the criticisms of the practice of federal courts of suspending or sustaining enforcement of state statutes

on the ground of unconstitutionality, by which one judge on *ex parte* hearing and affidavits suspended the acts of legislatures and commissions, the Congress (Act of June 18, 1910, Ch. 309, Sec. 17, 36 Stat. 557, and later amendments) amended Section 266 of the Judicial Code (28 U. S. C., Sec. 380), to require concurrence of at least three judges, at least one of whom must be a justice of the Supreme Court or a Circuit Court judge before a temporary injunction can be granted, and requiring that the application must be heard by a three judge court.

Congress also by the Act of May 14, 1933, Ch. 283, Sec. 1, 48 Stat. 775, amended Section 24, Judicial Code (U. S. C., Sec. 41), by depriving the district courts of jurisdiction of any suit to enjoin, suspend or restrain the enforcement, operation or execution of any order of an administrative board or commission of a state or any rate making body of any political subdivision thereof, or to enjoin, suspend or restrain any action in compliance with any such order where such order has been made after reasonable notice of hearing, and where a plain, speedy and adequate remedy may be had at law or in equity by the courts of such state.

By the Act of August 21, 1937, Ch. 276, Sec. 1, 50 Stat. 738, amending the same section, the Congress deprived the district courts of jurisdiction of any suit to enjoin, suspend or restrain the assessment, levy or collection of any tax imposed by or pursuant to the laws of any state where a plain, speedy and adequate remedy may be had at law or in equity in the courts of such state.

It will be noted that even by these amendments the right of the federal courts to interfere where there is no plain, speedy and adequate remedy at law or in equity in courts of the state is recognized.

Moreover, in each case a saving clause was adopted (Sec. 2, Act of May 14, 1934, and Sec. 2, Act of August 21, 1937; U. S. C., Sec. 41, Subd. 1a), permitting the continuance of any suit commenced in the district courts prior to the adoption of each amendment.

A reading of these amendments makes it clear that the Congress has recognized the right of the federal courts to enjoin parties from proceeding in the state courts and their construction of the provisions of Section 265, Judicial Code.

Section 266, Judicial Code, as amended, recognizes the power of a three judge court to restrain the execution of a statute or order, except in cases where a suit has been brought in a state court *and there has been a stay of proceedings under the statute involved pending decision by the state court and the suit in the state court is prosecuted with diligence and good faith.*

Section 24, Judicial Code, as amended, recognizes the right of federal courts to restrain an action in compliance with an order of an administrative board or commission of a state or a rate making body of any political subdivision thereof for the collection of a tax where there is no efficient remedy at law or in equity in the courts of the state.

This recognition by the Congress of the inherent powers of the federal courts (and it is a recognition and concurrence in the decisions of the court sustaining such powers because no specific authority to enjoin is given as in the Interpleader Act), is further demonstrated by the saving clauses last hereinbefore referred to, permitting the continuance to completion of suits brought prior to the amendments in the cases thereafter to be excepted.

The Congress has at no time expressed any disapproval of the practice of the federal courts of equity of protecting their own jurisdiction and decrees, and the fact that other restrictive amendments have been adopted indicates the concurrence of the Congress in the decisions of this Court recognizing the exceptions to Section 265.

CONCLUSION.

We respectfully submit that the decision of the Eighth Circuit Court of Appeals should and ought to be affirmed.

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Counsel for Respondent.

Erratum: All references in this Appendix are to first record.

APPENDIX.

John A. Thompson, His Associates And Corporate Connections.

Court's Finding 19.

John A. Thompson was interested in, and with his wife, M. K. Thompson, and his associates A. B. Wilder and Emory H. English, controlled the Phoenix Finance System, Inc., the Phoenix Finance Corporation, and Thompson and Company, which was the wholly owned subsidiary of the Phoenix Finance System, Inc. M. White was John A. Thompson's Secretary and an officer of the Phoenix Finance System, Inc. and of Thompson and Co. (R. 674, 545, 684, 589; Master's Finding 4, R. 129; Court's Finding 19, R. 188).

John A. Thompson's Control Of The Bridge Company.

Court's Finding 20.

In October and November, 1930, through negotiations with John W. Shaffer and Vernon W. O'Connor, John A. Thompson became president of and acquired control of the Bridge Company. At about the same time the number of directors of the Bridge Company was increased and Thompson, together with other directors in the Phoenix Finance System, Inc., became directors of the Bridge Company. From that time on Thompson controlled the Bridge Company. At a directors' meeting November 1st, 1930, O'Connor resigned as president, Thompson was elected president and O'Connor became chairman of the Board (R. 538, 861-862; Master's Report, R. 123; Master's Finding 4, R. 129; Court's Finding 20, R. 188)

On November 11th, 1930, an annual meeting of stockholders was held at which J. A. Thompson, President, presided and his wife, M. K. Thompson, acted as Secre-

tary. 1509 shares of stock were represented in person, 1500 of which shares were those held by the Standard Shares Holding Company, represented by John W. Shaffer, President, and 9 shares by two other stockholders. Proxies were represented by V. W. O'Connor for 664 shares, the total number of shares represented being 2173. The meeting was controlled by John A. Thompson and his associates, John W. Shaffer and Vernon W. O'Connor (R. 865-871).

The stock ledger shows that on November 26th, 1930, 1400 shares of Class A stock and 1800 shares of Class B stock were issued to John W. Shaffer and Company, and on the same day the same number of shares of stock were transferred by Shaffer and Company to Thompson and Company, and Thompson and Company on that date also held an additional four shares of Class B stock. (R. 596, 1335). John A. Thompson in November, 1930, had personally 40 shares of Class A stock and 25 shares of Class B stock. (R. 1305)

A. B. Wilder, another director of the Phoenix Finance System, Inc., held 5 shares of Class A and 5 shares of Class B Bridge Company stock in November, 1930 (R. 1311). The Class B voting stock of the Bridge Company then acquired and held by Thompson and Company, John A. Thompson, and A. B. Wilder, was 1834 shares, more than one-half of the total 3750 shares of Class B voting stock authorized or outstanding.

On March 10th, 1931, an annual meeting of stockholders was held, at which were represented Thompson and Company by John A. Thompson 1310 shares, and the total number of shares represented personally and by proxy being 2588 shares, said John A. Thompson represented more than a majority of the stock represented in person and by proxy and controlled the meeting (R. 886-890).

At the stockholders' meeting of December 22nd, 1931, when the bonds were purportedly voted, the total stock

voted by John A. Thompson by proxy and in person was 642 shares and by Mr. Thorson by proxy 1011 shares and in person eighteen shares, by Mrs. John A. Thompson twenty shares, and by M. White, John A. Thompson's Secretary, eighteen shares. The total vote for the resolution at the meeting as shown by the record was 2273 shares, with 365 shares voting against it. Of the votes cast for the resolution, Thompson, Thorson, Mrs. John A. Thompson (M. K. Thompson) and M. White voted 1709 shares, as shown by the record more than one-half of the stock represented in person and by proxy (R. 591, 955-958) Thorson was a Thompson director in the Bridge Company. Eighteen shares of Class B stock of the Bridge Company had been transferred to him from Thompson and Company by John A. Thompson. He paid nothing for them, and later transferred them to the Phoenix Finance Corporation. On the same day there was one share of stock transferred to him by John A. Thompson for which he paid nothing (R. 595, 609). He was employed by Thompson in the work of the Bridge Company, (R. 641), and elected a director at Thompson's suggestion (R. 642). He always acted with Thompson and never took issue with him (R. 642, 667). The proxies voted by Thorson at the December 22nd, 1931, meeting read to Oscar R. Thorson, John H. Thompson, Emory H. English (R. 947-949). Emory H. English was another director of the Phoenix Finance System, Inc., and also a director of the Bridge Company (R. 546). One share of Class B Bridge Company stock was transferred to Emory H. English from Thompson and Company. There was no further Bridge Company stock issued or transferred to him (R. 594). He never took issue with John A. Thompson (R. 668). The proxies running to the three persons named were voted by Oscar R. Thorson (R. 955-958, 591).

John A. Thompson, at the stockholders' meeting of December 22nd, 1931, when the bonds were voted, dominated and controlled the meeting. He stated:

"It don't make any difference how many of you stockholders vote here. I've got the votes to carry it." (R. 664)

He stated that he had enough votes to control the meeting on the bond issue, that the bond issue would go through, and that the stockholders present would be allowed to vote by courtesy only. There were stockholders who attempted to talk and he told them to "sit down", and gave them no opportunity to express themselves. He called some of the stockholders "peanut stockholders" (R. 672, 673, bottom p. 686, top p. 687). That he fully appreciated the power of his dominant control in the Bridge Company, is shown by the fact that Exhibit 19 G.A.B., the consolidated balance sheet of Phoenix Finance System, Inc., and subsidiary corporations, as of December 31st, 1931 (R. 1419), in which the Iowa-Wisconsin Bridge Company is listed as a subsidiary of Phoenix Finance System, Inc. (R. 675, 1419) was prepared under his instructions.

At the annual stockholders' meeting held on March 8th, 1932, out of 2917 votes cast at the election John A. Thompson, Oscar R. Thorson, and H. T. Wagner held 1301 proxies, with others they held 21, and Wagner held 195. John A. Thompson cast 264 votes in person. Thus Thompson and his associates cast 1781 votes out of a total of 2917 and controlled the election of the board, at which a majority of Thompson controlled directors, to-wit: John A. Thompson, H. T. Wagner, Oscar R. Thorson, Emory H. English, M. K. Thompson, and A. B. Wilder, were elected (R. 986-999). At the directors' meeting immediately following, the officers elected were John A. Thompson, President; Emory H. English, Vice President; Oscar R. Thorson, Secretary and Treasurer; M. K. Thompson, Assistant Secretary and Treasurer (R. 1001, 1002).

A Board of Directors of the Bridge Company was selected by John A. Thompson at a stockholders' meeting held on July 8, 1933. There were present in person 964

shares. Oscar R. Thorson held proxies for 435 shares and John A. Thompson proxies for 848 shares which were recognized. That proxies of 125 other shares were held by Oscar R. Thorson which were not voted. There were 1415 other proxies which through Thompson's control of the meeting were not recognized nor permitted to vote on the alleged ground that a by-law provided that proxies should be filed with the secretary more than five days prior to the meeting, although the by-law provided that notwithstanding such provision, the stockholders present or represented at the meeting could by vote waive the provisions and have all stock voted whether their proxies were filed before the meeting or not.

A motion was made at the meeting by an independent stockholder, that all proxies held at the meeting be voted. The independent stockholders, present cast 555 votes for the motion but it was voted down by the votes of the Phoenix Finance System, Inc., and by the proxies held by Mr. Thorson. There were 1388 shares cast against it and of these, 1155 were the proxies held by Oscar R. Thorson and by John A. Thompson of the Phoenix Finance Corporation. On the final vote for directors, there were 1878 votes cast and 1440 of these votes were cast for a Thompson controlled Board of Directors. Of these 1440 votes Phoenix Finance Corporation and Oscar R. Thorson controlled at least 1155. There were 412 votes of those present cast for independent nominees for directors and if the 1415 proxies held by independent stockholders had been recognized, there then would have been sufficient votes to elect an independent Board of Directors (R. 1033).

Of the directors of the Iowa-Wisconsin Bridge Company who served as such from the time Thompson became president of the Bridge Company until after the last of the bonds in question were issued, the majority were Thompson controlled and dummy directors.

The relationships of Emory H. English and Oscar R. Thorson to Thompson have already been set forth.

M. White was John A. Thompson's secretary. She owned no stock of the Bridge Company except qualifying shares transferred to her by John A. Thompson from Thompson and Company's holdings, for which she paid nothing (R. 593-594). She was assistant secretary and treasurer and a director of the Phoenix Finance System, Inc., and a director and officer of Thompson and Company. She never took issue with John A. Thompson (R. 588, 589, 668).

A. B. Wilder owned $100,000.00 of stock in Phoenix Finance System, Inc. (R. 626), was a director of that corporation, and also of the Phoenix Finance Corporation (R. 546, 550) and a director of the Bridge Company (R. 626). He never took issue with John A. Thompson (R. 668).

M. K. Thompson was the wife of John A. Thompson (R. 638).

N. W. Elsberg never held any stock in the Bridge Company and took no active part in the affairs of the Bridge Company (R. 594, 643).

A. N. Nystrom never held any stock in the Bridge Company (R. 594). He was a stock salesman for Thompson and Company (R. 590).

C. H. Young never held any stock of the Bridge Company (R. 594). He attended only a few meetings and never examined the books of the company nor went into any of the details connected with the Company (R. 643).

J. W. Dempsey was one of the original promoters of the bridge project (R. 665). He never took any issue with Thompson at any meetings except on election of director as hereinafter stated, and particularly did not take issue with him on the bond issue at the December 22nd, 1931, meeting (R. 668).

H. T. Wagner was a stockholder, but a part of his stock subscription in the amount of $2,000.00 was cancelled about the time the bond issue was voted (R. 595-596; Journal R. 1515). Such cancellation of subscription was charged under a heading "Expense-Cost of Bridge"

(R. 1551). The minutes show no authority by the directors for such cancellation. The minute records show that he never voted against Thompson on any issue (R. 865-1010). He did not take any issue with Thompson at directors' meetings, nor on the bond issue (R. 668).

Vernon W. O'Connor, by his own statement, had absolute confidence in Thompson and followed his directions (R. 640-641).

J. H. Thompson held only three shares of stock in the Bridge Company (R. 595). He operated the Peoples Bank at Lansing, with which the Bridge Company carried an account (R. 667). He was a joint proxy holder with Emory H. English and Oscar R. Thorson at the stockholders' meeting on December 22nd, 1931, at which the bond issue was voted, and permitted Oscar R. Thorson to vote the proxies for the bonds (R. 947-950, 965).

Thompson's control of the Board as it existed when the bond issue was voted, is also illustrated by the minutes of the Board of Director's meeting held on December 22nd, 1931, immediately following the voting on the bond issue. C. H. Young, having resigned, H. A. Schremser, an independent stockholder and one of the witnesses for interveners in this action, and Mrs. M. K. Thompson, the wife of John A. Thompson, were nominated to fill the vacancy. On the vote, Messrs. Bakewell, Foote, Dempsey and John H. Thompson voted for Mr. Schremser and Messrs. English, Thorson, Wagner, Wilder, J. A. Thompson, and Miss White voted in favor of the election of Mrs. Thompson (R. 965, 966).

When John A. Thompson became president of the Bridge Company in 1930 he acquired actual knowledge of all the dealing, contracts, assignments, and transactions that had previously occurred as above set forth and the relationship of the parties thereto to the Bridge Company (R. 679, 680, 581, 638; Court's Finding 20, R. 188).

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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 19.

PHOENIX FINANCE CORPORATION, A CORPORATION OF THE STATE OF DELAWARE, PETITIONER,

VS.

IOWA-WISCONSIN BRIDGE COMPANY, A CORPORATION OF THE STATE OF DELAWARE, RESPONDENT.

RESPONDENT'S PETITION FOR REHEARING.

FRED A. ONTJES,
WILLIAM C. GREEN,
Counsel for Respondent.

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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 19.

PHOENIX FINANCE CORPORATION, A CORPORATION OF THE STATE OF DELAWARE, PETITIONER,

VS.

IOWA-WISCONSIN BRIDGE COMPANY, A CORPORATION OF THE STATE OF DELAWARE, RESPONDENT.

RESPONDENT'S PETITION FOR REHEARING.

Comes now the respondent, Iowa-Wisconsin Bridge Company, and respectfully petitions for a rehearing in the above entitled action upon the following grounds:

I.

In Its Decision Reversing the Decree of the Circuit Court of Appeals for the Eighth Circuit, This Court Inadvertently Overlooked and Failed to Pass upon That Portion of the Decree of the Trial Court, Considered and Affirmed by the Circuit Court of Appeals, Which Required Petitioner to Satisfy, Release and Remove from the Records the $50,000 Mortgage Referred To in the Litigation, Said Mortgage Being in No Manner Involved in Any Litigation in the State of Delaware and Section 265, Judicial Code, Having No Application to Such Portion of the Decree.

The decision of the majority of this Court is based on its opinion that because of the provisions of Section 265 of

the Judicial Code the trial court had no power to enjoin petitioner from proceeding with certain suits instituted by it in the State of Delaware.

The ultimate decision is that the decree of the Circuit Court of Appeals be reversed. That decree provided *inter alia* (R. 721):[1]

> "f. That said Phoenix Finance Corporation, its officers, agents, servants, attorneys and employees and all those acting by, through or for them and its successors and assigns, jointly and severally are commanded and ordered forthwith to satisfy, release and remove from the records of the Recorder's office of Allamakee County, Iowa, and from the records of the Registrar of Deeds of Crawford County, Wisconsin, that certain mortgage executed by Iowa-Wisconsin Bridge Company to Phoenix Finance System, Inc., dated March 10, 1931, covering the property and assets of Iowa-Wisconsin Bridge Company, which said mortgage was filed for record and recorded in the office of the Recorder of said Allamakee County, Iowa, on or about the 2nd day of June, 1939, and recorded in Book L, pages 625, 626, and which was recorded in the office of the Registrar of Deeds of Crawford County, Wisconsin, on the 18th day of May, 1939, and recorded in volume 153, page 293, and that they deliver the original of said mortgage and note secured thereby for cancellation to the Clerk of this Court."

The mortgage which petitioner was thus required to satisfy, release and remove from the records was in no manner involved in any of the Delaware suits, prosecution

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[1]As in the briefs, where reference is made to the original or first record in this cause on the former petition for certiorari in this court by Phoenix Finance Corporation (No. 438, October Term, 1938), the letters "F. R." will be used in the reference, and the letters "F. R. Supp." in references to the supplemental volume thereof. Whenever reference is made to the record in the supplemental and ancillary proceedings here involved, the letter "R" will be used in the reference.

of which was sought to be enjoined, as will be readily ascertained from an examination of the supplemental and ancillary bill (R. 10, par. 11); the decree (par. 12, R. 712-713), and the pleadings in the Delaware cases (Exhibit S. C. 1, R. 294-301; S. C. 2, R. 301-307; S. C. 3, R. 307-319; S. C. 4, R. 320-339; S. C. 5, R. 340-373).

No reference is made in the opinion of the majority of the court to that portion of the decree, and none of the reasons assigned for the majority decision are applicable to it. The portion of the decree of the trial court referred to in this section of the petition was fully considered and passed upon by the Circuit Court of Appeals (R. 770, 780, 781).

The general rule is:

> "The effect of a general and unqualified reversal of a judgment, order or decree is to nullify it completely and to leave the case standing as if such judgment, order or decree had never been rendered, except as restricted by the opinion of the appellate court."
>
> 5 C. J. S., p. 1476, Sec. 1950.

It was held in the Sixth Circuit, *I. T. S. Rubber Co.* v. *Tee Pee Rubber Co., Inc.*, 295 Fed. 479, 481, that where a decree of injunction had been entered enjoining two acts and upon review the decree was reversed and the case remanded, the entire decree was vacated and the entire injunction dissolved, although one question was not raised, considered or decided by the court.

Upon argument Mr. Justice Black inquired of counsel for petitioner whether if this Court should hold that the lower court had no jurisdiction to grant the injunction because of Section 265, Judicial Code, would such a holding affect that part of the injunction relating to the mortgage; to which counsel for petitioner replied that it would not; whereupon Mr. Justice Black stated that it seemed to him it would not affect that part relating to the mortgage.

We are mindful of this and of the statement in *Wolff Packing Co.* v. *Industrial Court*, 267 U. S. 552, 562, "judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided," but since the matter is not free from doubt and in order to avoid future complications we believe the opinion should specifically provide for the affirmance of this portion of the decree, regardless of what may be the final conclusion on petition for rehearing as to the matters specifically referred to in the decision of the Court.

The facts with reference to the portion of the decree in question, record history and record references were fully set out in respondent's brief in this case (pp. 6; 7; 12-13; 19; 21; 24; 38; 44-45; 53; 55; 57-58; 76; 79-81; 90; 122-124; 125-126), and in its supplemental brief (pp. 11-12).

Argument as to the applicable law was presented in respondent's original brief (pp. 205-208), and briefly in its supplemental brief at page 24.

See Court's Finding 8 R. 41, 42; Finding 26, R. 53-54; Finding 38, R. 62; Finding 40, R. 64, 65, and Decree R. 67.

We also call attention to the fact that by its petition for rehearing in the main case petitioner asked "that the decree be modified so as to withhold from adjudication the question of the validity of the $50,000 mortgage given by the Bridge Company to petitioner, reserving the right to petitioner to litigate said mortgage in another action if it so desired (F. R. 223, par. 3), referring to allegations of supplemental and ancillary bill (R. 4, par. 3). This prayer of the petition was denied (F. R. 412-413). The findings of the lower court as to lack of consideration for and fraudulent character of the mortgage were affirmed by the Circuit Court of Appeals in its original opinion (R. 85; 89), and the order denying petitioner the right to have reserved from adjudication the question of

the validity of the $50,000 mortgage specifically affirmed (R. 91-92).

As to the effect of litigating this question upon the petition aforesaid, see

Spencer v. *Watkins*, (8 C. C. A.) 169 Fed. 379, Cert. den., 215 U. S. 605.

If, as is conceded by the majority opinion in the instant case, the rule has become well settled that Section 265 does not preclude the use of injunction by a federal court to restrain state proceedings seeking to interfere with property in the custody of the court, certainly there can be no question as to the power of a federal court to issue an injunction against parties before it who seek to interfere with the title to property still in the custody of the court under receivership by recording an instrument which that court has held to have been void in its inception because of fraud and lack of consideration.

We, therefore, respectfully submit (without waiving the other grounds of this petition for rehearing), that the decision of this Court should be modified to affirm that portion of the decee of the Circuit Court of Appeals for the Eighth Circuit which affirmed paragraph (f) of the decree of the trial court commanding petitioner to satisfy, release and remove from the records the $50,000 mortgage herein referred to (R. 721-722).

II.

The Court in Its Majority Opinion Has Overlooked the Fundamental Basis of Prior Decisions Upholding Federal Court Injunctions Prohibiting Parties from Relitigating in State Courts Matters Once Determined, Despite the Provisions of Section 265, Judicial Code; to-wit, That a Federal Court of Equity Has the Power to Issue Such Injunctions in Supplemental and Ancillary Proceedings to Effectuate Its Own Decrees, in Order to Avoid Relitigation of Questions Once Settled Between the Same Parties, or, As Other-

wise Expressed, to Secure or Preserve the Fruits and Advantages of a Judgment or Decree Rendered Therein.

A.

Foreword.

Counsel for respondent realize the appearance of temerity involved in asserting that a majority of this Court has failed to properly interpret its decisions, and further realize how infrequently petitions for rehearing are granted by this Court, particularly where they have been so extensively argued and carefully considered as in the instant case. A strong sense of duty, not only to our client but to all litigants in the federal courts who may find themselves in a similar position and indeed to the national system of courts itself, however, requires that we call to the attention of the Justices as forcibly as possible, the fact that by the decision here involved a policy of this Court and a statutory construction, repeatedly announced since 1875, and consistently followed by the lower courts, have been reversed—and this without any expressed demand for such a change; in the face of acquiescence (if not express approval) by Congress in the policy and the construction, and without regard to the disastrous effect upon litigants.

To illustrate the last, in the instant case the litigation was started in August, 1933; the petitioner here through its representatives, the Trustees, chose the federal court as the forum; the case was heard before a master; it was tried before a district judge on the record and voluminous exceptions to the master's report; after decree petitions for rehearing and modification were filed and passed upon; an appeal was taken to the Circuit Court of Appeals; upon affirmance there certiorari was prayed and denied by this Court. The mandate of the Circuit Court of Appeals was finally entered on April 6, 1939. The record in the main suit consists of over 1,700 printed pages and this after a reduction of the testimony to narrative form.

Thousands of dollars were necessarily spent in the defense of the case. When petitioner, having been defeated at every stage of the proceeding, attempted relitigation by the commencement of numerous suits in Delaware and respondent, relying on the prior decisions of this Court, instituted these proceedings and they have been carried on for two years. Today we are told that all that has gone before during the past eight years has been for naught. The several hundred stockholders of respondent, who have been found to have been so outrageously cheated and defrauded by petitioner, its predecessors and officers, that even the judges of the Delaware court were impelled to say they wondered that the recital of the long and sordid story of financial manipuluation and mismanagement which had characterized the history of the Bridge Company had been confined to reports of civil and equitable proceedings (14 Atl. 2d 386), are told they will probably lose everything they fought so long to save, because no person or corporation of moderate means can withstand such a continued *blitzkrieg* of relitigation. With the doors thrown wide open, any litigant who prevails in the federal court, whether he entered it himself or was brought in as was respondent, may be subject to the same disaster.

This is not a mere procedural matter. It is not a matter of such small consequence that theoretical criticisms by writers of law review articles should be taken as a guide for decision. It is a matter of vital importance in the practical administration of justice, and counsel for respondent most earnestly urge upon each Justice considering this petition the deepest and most careful reconsideration of the fundamental principles of equity, comity, justice—and common sense—involved, in the light of the decisions in which at least forty distinguished members of this Court have concurred during the past sixty-five years, to say nothing of the decisions of district courts and circuit courts of appeal which have interpreted those decisions as is contended for by respondent here, and have followed them.

B.

Classification of Decisions.

In the majority opinion the prior decisions of this Court are so classified as to make it appear that "relitigation" cases are few in number, and that the principles announced in other cases upholding the right of injunction despite section 265[2] are not applicable to them. Such a classification, we respectfully submit, is not in accord with the basic holdings in the decisions.

(1)

REMOVAL CASES.

In the majority opinion it is stated that Section 265 has always been deemed applicable to removal proceedings and that "the true rationale of these decisions is that the Removal Acts have *pro tanto* amended the Act of 1793."

Section 12 of the Judiciary Act of 1789 (Act of September 24, 1789, c. 20, 1 Stat. 73), after the provisions for a petition and bond on removal continued: "It shall then be the duty of the state court to accept the surety and proceed no further." Substantially this language has been carried down to the present time (Sec. 29, Judicial Code; U. S. C., Tit. 28, Sec. 72). Certainly it does not seem logical to say that Section 12 of the Judiciary Act of 1789 amended the Act of 1793 on the one hand, and on the other to assert that Section 14 of the same 1789 Act (Sec. 262, Judicial Code) was "obviously limited by the subsequent enactment of the specific prohibitory provisions of the Act of 1793." This Court has not previously so held, but on the contrary has said that the 1789 Act and the 1793 Act should be construed in connection with each other.

Kline v. *Burke Construction Co.*, 260 U. S. 226, 229.

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[2]This numbering of the Section will be used throughout this petition without reference to dates of decisions discussed.

See also *Sharon* v. *Terry*, often cited by this Court, 36 Fed. 337, 365.

Dietzsch v. *Huidekoper*, 103 U. S. 494, was not decided on the ground that there was any *pro tanto* amendment of Section 265 by the Removal Acts. The grounds for decision were these:

(a) A court of the United States is not prevented from enforcing its own judgments by a statute which forbids it to grant a writ of injunction to stay proceedings in a state court.

(b) The court had jurisdiction of Dietzsch and could enforce its judgment against him or those whom he represented.

(c) If the bill (for injunction) was not maintainable, judgment in favor of the appellees would settle nothing, but instead of terminating strife between them and their adversary, would leave them under the necessity of engaging in a new conflict elsewhere. This would be contrary to the plainest principles of reason and justice.

(d) As the bill was filed for the purpose of giving to litigants on the law side of the court the substantial fruits of a judgment rendered in their favor, it is merely auxiliary to the suit at law, and the court has the right to enforce the judgment against the party defendant and those whom he represents, no matter how or when they may attempt to evade it or escape its effect unless by a direct proceeding.

Nor does *Madisonville Traction Co.* v. *Mining Co.*, 196 U. S. 239, refer to any such distinction.

Kline v. *Burke Construction Co.*, 206 U. S. 226, in no manner involved the Removal Acts and throws no light on this particular question.

The grounds of decision stated in *French* v. *Hay*, 22 Wall, 250, 253, are referred to as "loose." Without repe-

tition of citations, we merely note that it has been cited in practically every case dealing with the question here involved and this holding has never been disapproved. It cannot be deemed a carelessly considered decision because it was written in connection with *French, Trustee,* v. *Hay et al.*, 22 Wall. 238, in which the general features of the litigation and the removal features were carefully considered. Appellant very specifically raised the objection under the 1793 Act, citing *Peck* v. *Jenness*, 7 How. 612, 625. The decision was based, not on any provision of the Removal Acts but on the grounds later restated in *Dietzsch* v. *Huidekoper, supra,* which have been summarized, and upon the ground that the prior jurisdiction of the federal court took the case out of the operation of the 1793 Act.

Bryant v. *Atlantic Coast Line R. Co.*, 22 F. 2d 569, 571, also cited, merely discusses the exception *obiter* and speculates as to a distinction not found in any decisions of this Court.

Finally, in the article by Taylor & Willis appearing in 42 Yale Law Journal 1169-1197, the authors say (Note 37, p. 1175):

> "A prohibition against continuance of the action in the state court *is certainly not a repeal pro tanto of the prohibition against issuance of injunctions to prevent such continuance*" (Emphasis supplied).

(2)

CASES UNDER INTERPLEADER ACT.

Treinies v. *Sunshine Min. Co.*, 308 U. S. 66, 74, was based, insofar as the injunction was involved, on the Interpleader Act. *Dugas* v. *American Surety Co.*, 300 U. S 414, is a "relitigation case" and its decision was not based solely on the Interpleader Act. In the interpleader proceedings a permanent injunction had been issued

against any suit against the American Surety Company. The interpleader proceedings were closed by a final distribution. Dugas then brought suit in a Louisiana court against the New York Casualty Company, surety on an appeal bond furnished by American prior to the interpleader proceedings. After a judgment of dismissal, a reversal of that judgment and a remand for further proceedings, American secured a supplemental bill in the interpleader suit restraining Dugas from further proceeding in his suit against the New York Company. Dugas' counsel pointed out that the injunction in the interpleader suit did not dircetly forbid Dugas from suing on the appeal bond but only from instituting or prosecuting any suit against the American. With reference to that contention the court said:

> "But the injunction, being only one part of the decrees, is not the exclusive criterion of what was determined and effected by them. Its purpose was to forestall anticipated departures and not to limit other provisions or restrict their operation and effect" (p. 427).

Then after reciting other provisions of the decree and holding that a supplemental bill might be brought in aid of and to effectuate the prior decree, while holding that the power of the court to enjoin Dugas had full support in Sections 2 and 3 of the Interpleader Act, the court added (pp. 28-29):

> "As also under settled adjudications respecting power of the federal court to protect its jurisdiction and decrees," citing

French v. *Hay, Root* v. *Woolworth, Julian* v. *Central Trust Co., Madisonville Traction Co.* v. *St. Bernard Mining Co., Looney* v. *Eastern Texas R. Co.,* and *Wells-Fargo Co.* v. *Taylor,* referred to herein.

This decision in 1937, in view of the cases cited at last above set forth, demonstrates clearly that this Court

has always based its exceptions to Section 265 on the right of the court to protect its jurisdiction and decrees, regardless of the nature of the particular case before it.

In the majority opinion, the Interpleader Act of 1926, *supra*, the Limitation of Ship Owners' Liability Act of 1851 and the Frazier-Lemke Act are referred to as containing statutory qualifications of Section 265 and as implied legislative amendments of it.

We respectfully submit a correct statement should be that the provisions of those Acts which either directly or inferentially authorize the issuance of injunctions against proceedings in state courts were supplementary to the provisions of Section 265 as construed by this Court.

Concededly under the doctrine of comity, this Court had always held that where a state court first properly acquired jurisdiction, the federal courts might not interfere with its proceedings by injunction.[3]

By the Limitation of Ship Owners' Liability Act it was provided that upon transfer to a trustee for the benefit of the claimants of the interest of an owner in a vessel "all claims and proceedings against the owner or owners shall cease." 9 Stat. 635, 636. This referred as well to claims already in suit in state courts as to those not yet sued upon, and the Act was held to extend the power of the federal courts to enjoin even in those cases—an extension of the power given by Section 265 as construed. This was recognized in *Providence & N. Y. S. S. Co.* v. *Hull Mfg. Co.*, 109 U. S. 578, cited in the majority decision.

So with the Interpleader Act. Injunctions which may be issued under that Act are not limited to cases in which the federal court has first acquired jurisdiction, but may be used to enjoin pending proceedings in a state court. See *Treinies* v. *Sunshine Min. Co.*, *supra*.

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[3]*Diggs* v. *Keith & Wolcott*, 4 Cranch 179; *Peck* v. *Jenness*, 7 How. 612; *Watson* v. *Jones*, 13 Wall. 679.

The Frazier-Lemke Act also in terms prohibits the maintenance of proceedings "if instituted at any time prior to the filing of a petition."

The expressions of Congress to these statutes, therefore in no manner disapproved the construction which had been given Section 265, but, recognizing that construction and the limitations of it, extended the powers of the federal courts as to injunctions against parties proceeding in state courts to cases where the state courts had priority of jurisdiction. The purpose of each Act is plain, and equally plain is the object of Congress, which was to confer upon the federal courts a power which had not yet been given them under this Court's construction of Section 265 nor under the original Bankruptcy Act, to-wit, the power to permit the enjoining of parties *already* in the state courts from further proceeding there in order that all the claims, secured and unsecured, against the debtor or to a fund might be brought into one proceeding in one court, dealt with at one time, and all relative rights and priorities determined there.

(3)

INJUNCTION IN CASES INVOLVING RES.

The majority opinion states that the rule has become well settled that Section 265 does not preclude the use of the injunction by a federal court to restrain state proceedings seeking to interfere with property in the custody of the court. That is true, but there is no justification for such a holding under a literal interpretation of Section 265, nor is there any justification for upholding the excepting in *res* cases and disregarding the exception which has been recognized in other cases.

The so-called "*res*" decisions do not, except in a few instances, rest upon the theory of preventing contests between the representatives of two distinct judicial systems over the same physical property, which might give rise to actual physical friction. That situation does arise

—not in cases where the injunction is granted to effectuate a prior decree of the court and secure or preserve fruits or advantages of a judgment or decree—but where two actions are pending simultaneously, but one court has first secured actual or constructive possession of the physical property.

It was such situations which the court was discussing in *Kline* v. *Burke Construction Co.*, 260 U. S. 226. In that case two actions *in personam* involving the same issue, were pending simultaneously in state and federal courts. Before final judgment in either, the federal court issued an injunction restraining the plaintiffs in the state court from proceeding. No question of relitigation was involved. The Circuit Court of Appeals had been of the opinion that the Burke Company was entitled to have a trial and adjudication by the federal court, and that as the second suit might be prosecuted so as to secure an adjudication in the state court before the action in the federal court could be adjudicated, then the federal court's adjudication would be made futile. This Court held that the Burke Company had no such constitutional right. Its discussion as to custody of the *res* was limited to those cases in which courts of equal rank are attempting to proceed and one of them has taken into its jurisdiction a specific thing, in which case the rule is applied that the court first acquiring jurisdiction shall proceed without interference from a court of the other jurisdiction, and it was stated that this particular rule would not apply where both co-pending actions were *in personam* without a judgment having been entered in either. The court did not pass upon the situation which exists here where the action in the federal court has proceeded to decree and the injunction is in aid of that decree. This distinction has been made by this court in *Local Loan Co.* v. *Hunt*, 292 U. S. 234.

In *Farmers Loan & Trust Co.* v. *Lake St. R. Co.*, 177 U. S. 51, the federal court had acquired jurisdiction of the

res by the commencement of foreclosure proceedings before the commencement of similar proceedings in the state court.

In *Lion Bonding Co.* v. *Kratz*, 262 U. S. 77, the state court had possession of the property of an insurance company at the time a receiver was appointed in federal court and it was held entitled to retain it.

These cases, however, are not such *res* cases as are here in point and which are not distinguishable from what the majority opinion terms "relitigation cases."

In *Riverdale Mills* v. *Manufacturing Co.*, 198 U. S. 188, a foreclosure decree had been entered, a sale had and conveyance made. Thereafter a suit was commenced in an Alabama court attacking the foreclosure proceedings. Injunction was asked against this suit. Mr. Brandeis for the appellant squarely contended that regardless of whether the suit had been terminated or not, the petitioner was entitled to bring an ancillary bill (Brief in support of petition for rehearing, No. 194, October Term, 1904, p. 26), and that the provisions of Section 720 had no application where an injunction was sought in order to enable the court fully to exercise its jurisdiction (Petitioner's brief, s. c., p. 45). Counsel for the respondent contended flatly that "the objection that the Circuit Court of the United States *cannot* enjoin proceedings in the state court is an objection which cannot be surmounted," and that the remedy of the parties was to allow the proceedings to pass to judgment and if the highest court of the state should not decree in their favor, then carry the case by writ of error to the Supreme Court of the United States (Respondent's brief on certiorari, s. c., p. 71 *et seq.*).

This Court did not base its decision on the ground of avoidance of conflict between courts over the custody of property but on the ground that a federal court "may protect the title which it has decreed as against everyone, a

party to the original suit and prevent that party from relitigating the questions of right which had been determined," and that "the jurisdiction of courts of equity to interfere and effectuate their own decrees by injunctions or writs of assistance in order to avoid relitigation of questions once settled between the same parties is well settled" (p. 195).

The court cited with approval *Julian* v. *Central Trust Co.*, 193 U. S. 93, referred to in both opinions here. In that case the proceedings in the federal court had ended. The court no longer had anything to do with the property (In the instant case the property is still in the court's possession). Nevertheless this Court held that it was within the competency of the federal court to restrain the action in the state court in order to protect the title it had conveyed by the foreclosure proceedings.

Local Loan Co. v. *Hunt*, 292 U. S. 234, might be termed a *res* decision to the extent that the Court says: "And generally proceedings in bankruptcy are in the nature of proceedings *in rem*." However, there was no property in the hands of the federal court at the time of the institution of the state action. The discharge had been granted. There could be no physical conflict. This Court merely upheld the right of the federal court to "secure or preserve the fruits and advantages of the judgment or decree" and this notwithstanding the provisions of Section 265. What were the fruits and advantages of the judgment or decree there entered and protected? Not the bankrupt's title to the wages which were sought to be subjected to the state action, because they were never in the possession of the bankruptcy court not having been earned prior to the discharge. What the bankruptcy court by its decree had done was to relieve the debtor of his indebtedness. What the courts did in the main case here was to determine that the bridge company was not indebted to Phoenix for the amounts claimed as considerations for the various groups of bonds, which are now

involved in the Delaware cases. In the Local Loan case by virtue of the statute the party seeking injunctive relief had been adjudged free of the debt involved, and it was to preserve the advantage of that decree that the injunction was there granted and upheld. In the instant case the bridge company under the evidence has been adjudged not indebted to petitioner, and it is that advantage of the decree which the injunction here seeks to protect.

(4)

INJUNCTIONS TO RESTRAIN JUDGMENTS FRAUDULENTLY OBTAINED.

While impliedly criticising those decisions upholding the right of the federal courts to enjoin litigants from enforcing judgments fraudulently obtained in state courts, the majority opinion does not deny their existence. The reason for their decision is not as strong as those permitting injunctions in relitigation cases. The importance of these decisions lies in the fact that each of them reiterates in one form or another the recognized exception stated in the summary in *Wells-Fargo* v. *Taylor*, 254 U. S. 175, 183, as follows:

> "It has come to be settled by repeated decisions and in actual practice that, where the elements of federal and equity jurisdiction are present, the provision does not prevent (the federal court) from maintaining and protecting its own jurisdiction properly acquired and still subsisting, by enjoining attempts to frustrate, defeat or impair it through proceedings in state courts."

(5)

"RELITIGATION CASES."

Under this head we discuss particularly the cases referred to in the fourth and fifth sections of the majority opinion. The classification, however, should not be limited to them.

Dietzsch v. *Huidekoper* and *French* v. *Hay*, *supra*, classified as "removal cases," should properly be considered in the present classification, because in each case a decree had been entered in the federal court, an attempt was being made to proceed in a state court, and the injunction sustained was granted to prohibit the party defeated in the federal court from so proceeding. The basis of decision in each case has been discussed.

Dugas v. *American Surety Co.*, *supra*, classed as an interpleader case, was obviously a relitigation case.

Julian v. *Central Trust Co.*, *Riverdale Mills* v. *Manufacturing Co.* and *Local Loan Co.* v. *Hunt*, *supra*, classed as "*res*" cases, were also "relitigation" cases within any limitations of that term, and the decisions were not based on the rule of comity referred to in *Kline* v. *Burke Construction Co.*, *supra*.

Gunter v. *Atlantic Coast Line*, 200 U. S. 273, is referred to in note 7 to the majority opinion as a case which need not be considered. As pointed out in the dissenting opinion, it is obviously a relitigation decision. The original suit was in the federal court and a decree had been entered. State taxing officials had appeared. Thirty years later suit was commenced by state officers in a state court. Injunction was asked based on the former decree in the federal court. Both the Eleventh Amendment and Section 720 were set up as defenses. Appellee relied on *Garner* v. *Second National Bank*, 67 Fed. 833, and on *Sharon* v. *Terry*, *French* v. *Hay* and *Dietzsch* v. *Huidekoper*, *supra*, among other cases (Appellee's brief No. 88, October Term, 1905), and stood on the proposition that a federal court might issue an injunction to enforce and protect its own judgments. This Court, speaking through Mr. Justice White, said that the matter was not open to discussion, citing *Dietzsch* v. *Huidekoper* and *Julian* v. *Central Trust Co.*, *supra*, and *Prout* v. *Starr*, 188 U. S. 537.

The majority opinion in note 9 states that *Root* v. *Woolworth*, 150 U. S. 401, is erroneously regarded as illustrating the "relitigation" exceptions to 265. True no litigation had yet been commenced in the state courts but there had been a decree in the federal court, and it was alleged as a ground for injunction that the petitioner would be subjected to multiplicity of suits and that defendant threatened the institution of divers actions unless restrained. It is furuther pointed out in the dissenting opinion that the supplemental decree enjoined the defendant from bringing any action or actions touching the title to or possession of the premises involved. It states the rule which has since been followed by this Court that "the jurisdiction of courts of equity to interfere and effectuate their own decrees by injunctions or writs of assistance in order to avoid the relitigation of questions once settled between the same parties is well settled."

The majority opinion also states that *Looney* v. *Eastern Texas R. Co.*, 247 U. S. 214, is not a relitigation case. While as pointed out by Mr. Justice Reed in the dissenting opinion, the supplemental injunction was technically in aid of a temporary injunction rather than a final decree, it requires only a reading of the last paragraph of the opinion to demonstrate that this Court was making no such distinction and was following the same reasoning which it has consistently followed in all the cases above referred to. The assignments of error directly raised the point that the injunction was in violation of Section 265 (No. 756, October Term 1917, R. 571). The specifications again raised the point (s. c., Appellant's brief pp. 33-40). In arguing the proposition the appellant virtually conceded that relitigation cases constitute an exception to the literal language of Section 265, but claimed that the same matter was not involved in the state litigation as was involved in the first injunction proceeding (s. c., Appellant's brief pp. 41-44). The appellee argued directly that the court having acquired jurisdiction of the parties

"had the right in the protection of the jurisdiction thus acquired to enjoin the prosecution in the state court of a suit which undertook to deal with the same subject matter," citing

French v. *Hay*,
Dietzsch v. *Huidekoper*,
Gunter v. *Atlantic Coast Line*, and
Julian v. *Central Trust Co., supra*,

among other cases.

While, as has just been pointed out, at least eight of the leading cases discussed herein were in fact relitigation cases, *Supreme Tribe of Ben Hur* v. *Cauble*, 255 U. S. 356, is singled out as an illustration of the weakness of respondent's contention, because the decision as to Section 265 is in one sentence and cites only the Looney case, *including, however, the cases therein cited.* The fact is whether the opinion be short or long, the question as to the bar of Section 265 was squarely raised by the motion to dismiss (No. 274, October Term, 1920, R. 151), was fully presented by the appellant's brief (Appellant's brief, s. c., pp. 22-23), and was squarely decided.

The case of *Hale* v. *Bimco Trading Co.*, 306 U. S. 375, was cited and commented upon in respondent's supplemental brief (pp. 41-42). No reference to it, except as a comparison case (note 7), is made in the majority opinion.

We respectfully submit that the majority opinion in the instant case is in conflict with the decision of this Court in the Hale case.

While the injunction in that case did not prohibit anyone from proceeding with the Florida mandamus case, it did most effectively nullify proceedings of the state court by enjoining the state officers from enforcing the statute in question. The fact that the moving parties in the mandamus suit and in the injunction suit were different is immaterial. The practical effect was that by the decree of the federal court the proceedings in the state

court were made ineffectual. Neither can it make any difference that the Florida Supreme Court stayed its proceeding pending final decision of this Court in the injunction proceedings. If Section 265 is to be construed literally, there can be no waiver by a state court affected.

The state officers protested virogously that the injunction was a violation of Section 265, and cited, among other cases, *Dial* v. *Reynolds* and *Peck* v. *Jenness*, *supra*, to support their position (Appellant's brief, No. 418, October Term, 1918, pp. 11-17).

Counsel for appellees argued that the case came within certain of the well recognized exceptions to Section 265 as well as that the section does not apply after a final order has been made in the state court (Appellant's brief, s. c., pp. 13-16).

The decision of this Court in that case, by sustaining the injunction, admitted the propriety of departing from a literal construction of the statute and in effect said that the purpose was to avoid needless friction between two systems of courts having potential jurisdiction over the same subject matter, and it not being necessary to bring that safeguard into play, there was no occasion for disturbing the injunction.

We respectfully assert that the case at bar presents a situation where it is much less necessary to bring the safeguard referred to into play, and that in fact the construction of Section 265 in the majority opinion in the instant case will make for rather than avoid the needless friction referred to in the Hale opinion.

The majority opinion makes no reference to *Prout* v. *Starr*, 188 U. S. 537, except to say in note 9 that the "first come, first served" rationale of cases like that was discarded in *Kline* v. *Burke Construction Co.*, *supra*.

A careful reading of that case discloses that it was not a *res* case and was clearly a relitigation case. As stated in the dissenting opinion of Mr. Justice Reed, the federal court stipulation for a decree to conform with the

decree in a similar case was treated as a decree, and the subsequent action by the Attorney General in the state court was treated as an attempt to relitigate the issues which had been determined in the federal court. No question of *res* was involved. The court said:

> "The object of the supplemental bill was to restrain the present appellant as successor to Smyth from attempting to transfer the very matters that stood for judgment in the federal court to the state court by filing a bill in the latter. Such a course might bring about a conflict between those courts, and create the confusion so often deprecated by this Court."

The principle here contended for by respondent was settled as early as 1810 in *Mocher* v. *Reed*, 1 Ball & B. 318 (Ir. Ch.), in a case where the plaintiff having proceeded for some time before a master in chancery, filed a declaration in the court of common pleas for the same matter. The Lord Chancellor said:

> "After the plaintiff has obtained a decree to account he is not at liberty to dismiss the bill; having got the relief he prayed, his election is made, and he cannot afterward proceed at law; besides, how utterly inconsistent with the ends of justice it would be, to permit him to proceed in this court and at law at the same time for the same demand; for the jury may find a verdict one way and the master make a report a different way, which would occasion such a clashing of jurisdiction as never could be endured."

This case is denominated the leading case in *Garner* v. *Second National Bank*, (1st C. C. A.) 67 Fed. 833, cert. denied 163 U. S. 688, where the court said:

> "It is now so thoroughly settled that this provision of law (Sec. 720, R. S.) does not apply to proceedings incidental to jurisdiction properly acquired by a federal court for other purposes than that of enjoining proceedings in a state court, that the proposition needs no discussion by us."

The Garner case has been conceded leading in the circuits and by numerous district courts. See *Iron Mountain R. Co.* v. *City of Memphis*, (6 C. C. A.) 96 Fed. 113, 131; *Massie* v. *Buck*, (5 C. C. A.) 128 Fed. 27, 30; *Berdie* v. *Kurtz*, (9 C. C. A.) 75 F. 2d 898, 905. It was also relied upon in several of the briefs referred to *supra*, and as pointed out in the dissenting opinion, listed as an authority on 265 at the time of the 1911 revision of the Judicial Code.

In the Mocher case as in the Garner case a party sought to institute a suit at law while the equity suit was pending, and was promptly enjoined, not because of any conflict over the *res* but because such action would be "utterly inconsistent with the ends of justice." What is the difference between such a situation and one where the party waits until the equity suit is concluded and then, finding himself defeated, attempts to retry the case in a court of law?

(5a)

DIAL V. REYNOLDS.

The majority decision is apparently based on *Dial* v. *Reynolds*, 96 U. S. 340. It is the only decision of this Court since 1875 even hinting at a literal construction of Section 265.

The case is not even in point.

(a) The injunction was not sought to effectuate any decree.

(b) It was not a relitigation case.

(c) It was a case in which the state court had first acquired jurisdiction.

These statements find full support in the history of the case. Judgment had gone *in favor of Reynolds* in an ejectment action brought by him against Cooper in the Circuit Court for the Eastern District of Tennessee

upon writ of error sued out by Cooper. This Court had reversed the judgment *and ordered a new trial. Cooper* v. *Reynolds*, 10 Wall. 308. Reynolds then dismissed the case in the federal court and instituted a new ejectment action in the state court. *Dial* v. *Reynolds* was then instituted *as a new suit* by Dial and another as trustees under a deed of trust given by Cooper, asking foreclosure of the deed of trust, that the title of the trustees be quieted, and that Reynolds be enjoined from further prosecuting his action of ejectment.

(a) The injunction was not sought to effectuate any decree, because there was none to effectuate. The only decree ever entered in the federal court was in favor of Reynolds and that had been reversed and a new trial ordered.

(b) It was not a relitigation case because the matter involved had not theretofore been fully litigated. It certainly had never been finally determined in favor of Cooper or his trustees. The reversal did not carry with it directions for judgment in favor of Cooper. It merely ordered a new trial, and Reynolds having dismissed without a new trial, the case went out of existence without any final adjudication.

(c) The decision cites *Diggs* v. *Wolcott*, 4 Cranch 179, *Peck* v. *Jenness*, 7 How. 612, and *Watson* v. *Jones*, 13 Wall. 679. These decisions, as was pointed out in the memorandum furnished the Justices after argument, and as was pointed out by this Court in *Hull* v. *Burr*, 234 U. S. 712, 727, and *Simon* v. *Southern Ry. Co.*, 236 U. S. 215, regardless of the bald statements they made as to the statute, all involved cases where the first action had been taken in the state court. Such was the case in *Dial* v. *Reynolds*. With *Reynolds* v. *Cooper* dismissed without final adjudication, the new ejectment suit in the state court was prior in time to the foreclosure suit and no question of any exceptions to the statute was involved.

It should be remembered that Mr. Justice Swayne, who wrote the opinion, had written the opinion in *French* v. *Hay, supra,* and in *Dial* v. *Reynolds* gave no indication of any intention to recede from the prior decision, and all but one Justice sat in both cases. A majority of the Justices who sat in *Dial* v. *Reynolds* sat in *Dietzsch* v. *Huidekoper, supra,* in which not only was the ruling in *French* v. *Hay* specifically reaffirmed, but no mention made of *Dial* v. *Reynolds.* Among these was Mr. Justice Field, who later wrote the opinion in *Sharon* v. *Terry, supra,* and Mr. Justice Harlan, who participated in every case from *French* v. *Hay* up to and including *Gunter* v. *Atlantic Coast Line Co.,* (1906) *supra,* and wrote the opinion in *Madisonville Traction Co.* v. *St. Bernard Mining Co.,* (1905) *supra.*

The case has been seldom cited and never in support of a literal construction of the statute. It is referred to in *Wells-Fargo* v. *Taylor, supra,* but after being cited, the recognized exceptions are set forth.

We respectfully submit that *Dial* v. *Reynolds* is indeed a most fragile foundation for a decision by which this Court turns its back upon an unbroken line of decisions for sixty-five years.

C.

Injunction Against Parties Not a Restraint of the Court Itself.

No reference is made in the majority opinion to *Steelman* v. *All-Continent Corp.,* 301 U. S. 278 (1937), and to the cases therein cited, holding (p. 290):

> "We are unable to yield assent to the statement of the court below that 'the restraint of a proper party is legally tantamount to the restraint of the court itself.'"

In support of this statement by Mr. Justice Cardozo were cited numerous cases.

True, in the Steelman case there was involved a decree of a federal court enjoining the prosecution of a suit

in another federal court, and Section 265 was not involved. However, the Circuit Court of Appeals had found that the institution of an injunction suit in the New Jersey federal court was an attempt to oust the Pennsylvania federal court of a previously and validly acquired jurisdiction, so the question decided as just set out was directly in issue. This Court found support for the injunction by analogy in *Local Loan Co.* v. *Hunt, Kline* v. *Burke Construction Co.* and *Looney* v. *Eastern Texas R. R. Co., supra.* It was definitely stated in the opinion that the decision was not based upon any interference with the *res*—and much argument had been made on that. What the Court said there of the trustee might well be applied to respondent here:

> "He is not seeking an injunction to vindicate his exclusive control over a *res* in his possession or in the possession, actual or constructive, of the court that appointed him. * * * What he seeks is an injunction directed *to a suitor and not to any court* upon the ground that the suitor is misusing a jurisdiction which by hypothesis exists, and converting it by such misuse into an instrument of wrong" (Emphasis supplied).

The holding of this Court in the Steelman case is amply supported by the authorities cited, is consistent with reason and common sense and should not be overruled at this early date.

D.

Exceptions Imbedded in Section 265 by Judicial Construction.

We most respectfully assert that the statement in the majority opinion, "that apart from congressional authorization only one 'exception' has been imbedded in Sec. 265 by judicial construction, to-wit, the *res* cases," is not borne out by the decisions cited in the opinion and briefly analyzed in the petition. We feel satisfied after a painstaking re-reading of the decisions, and in many cases of

the briefs of counsel in this Court, that if each Justice who joined in the majority decision will carefully re-examine the cases here discussed, he will find that in practically every one the decision has been bottomed not on the basis of preventing interference with the possession of the *res* by the court granting the injunction but on principles of comity, and on the basis of securing to the successful party the fruits and advantages of the decree and preventing relitigation of questions once decided, and that it is actually the relitigation exception which has been most firmly imbedded in Section 265.

E.

Stare Decisis.

After a rereading of every case cited in both the majority and the dissenting opinion and a reading of the cases referred to in Mr. Warren's article not referred to in the opinions, we believe it can be confidently asserted that this Court and the great majority of the courts below following it, have never denied the right of federal courts of equity to enjoin proceedings in state courts necessary to maintain and protect their jurisdiction, make effectual their decrees and preserve and protect the rights of litigants, and have never given a literal interpretation to Section 265, except in the few cases where the state courts first acquired jurisdiction or where actions *in personam* were pending contemporaneously.

A principle of law has therefore been settled by a series of decisions which is binding on this Court and the lower federal courts and which should be followed under the rule of *stare decisis*. 21 Corpus Juris, Sec. 302. The fact that some cases were based on one state of facts and some on another does not alter the general principle which has been established.

To say that it is a denial of reality to suggest that litigants have shaped their conduct in reliance upon some loose talk in past decisions in the application of Section

265 is to say that the circuit courts of appeal which have considered the principle established and which is here contended for, have not comprehended the prior decisions of this Court and that this Court was in error in denying certiorari in the first Toucey case.

The principle underlying the rule of *stare decisis* was well stated by Justice Swayne in *Gilman* v. *City*, 70 U. S. 713, 724:

> "It is almost as important that the law should be settled permanently as that it should be settled correctly. Its rules should be fixed deliberately and adhered to firmly, unless clearly erroneous. Vacillation is a serious evil. *Misera est servitus ubi lex est vaga aut incerta.*"

See, also, *Walling* v. *Bown*, 9 Idaho 740, 2 Ann. Cas. 720, and cases cited.

The respondent had property rights established by the original decision of the district court, affirmed by the circuit court of appeals, with certiorari denied by this Court. *Deposit Bank of Frankfort* v. *Board of Councilmen of City of Frankfort*, 191 U. S. 499. It was declared free of the claims of petitioner. It had a right to proceed to carry on its business in reliance upon the finality of that decree. It had the right under the decisions of this Court to expect that its rights would be protected by injunction if necessary, and it has spent two years of time and much money in attempting to secure the protection which has heretofore been given litigants in like situations. This Court under every sound interpretation of the doctrine of *stare decisis* should give it that protection. Certainly a change of policy should not be made retroactive so as to deprive respondent of rights it possessed under settled law when the decree was entered in its favor. A decision of this Court should not be retroactive any more than legislation may be *ex post facto*. If a change of policy is deemed advisable, that should be accomplished through

legislation and not by a reversal of judicial construction, with proper saving clauses such as were placed by Congress in the Act of May 14, 1934, and the Act of August 21, 1937.

In this case there is no "new experience" in the light of which the former decisions should be reconsidered.

The recommendation contained in Attorney General Edmund Randolph's report to Congress of December, 1790, on the Judiciary Act of 1789, related to an injunction to a judgment at law of a state court, and from his note accompanying the report it is very clear that it related to cases first commenced in the state courts (American State Papers V. 1, Misc. No. 17, p. 26 and p. 34, Note 8).

On August 9, 1792, Chief Justice John Jay and associate justices wrote the President concerning a representation to Congress in which they stated that the task of holding 27 circuit courts a year in different states from New Hampshire to Georgia, besides two sessions of the Supreme Court at Philadelphia, were too burdensome and more than they could physically bear, and called attention to the fact that the Supreme Court ought to be a separate tribunal, and in effect that the members of the Supreme Court should be relieved entirely of their duties of holding various sessions of the circuit courts, so that they might not be called upon to correct in one capacity the errors which they themselves might have committed in another. The letter and representation contained nothing with respect to the granting of injunctions to judgments at law or actions in state courts (American State Papers V. 1, Misc. No. 32, pp. 51-53).

This court's decisions have been in line with Attorney General Randolph's recommendation holding that Judicial Code, Section 265, relates to actions first commenced in the state courts and not to cases where the prior jurisdiction of the federal court has been invoked.

Judicial Code, Section 265, contains the words "* * * by any court of the United States * * *," which includes the district courts, the circuit courts and this court. This court from the beginning has consistently held that the

federal courts have the power to enforce their decrees and to issue all necessary writs to carry them out and to make them effectual.

McKim v. *Voorhies*, 7 Cranch 279 (1812).

Wayman et al. v. *Southard et al.*, 10 Wheat. 22-23, 6 L. Ed. 253, 258 (1825).

United States v. *Keokuk*, 6 Wall. 518-520, 18 L. Ed. 918.

United States v. *Johnson County*, 6 Wall. 166.

There is nothing new with respect to the origin of Judicial Code, Section 265. Everything now advanced with respect to it was known to the judges of this court when the section was previously construed, and probably more, as the earlier decisions were much nearer in point of time.

In *United States* v. *Johnson County*, 6 Wall. 166, 18 L. Ed. 768 (January 13, 1868), this court stated: "Jurisdiction is defined to be the power to hear and determine the subject-matter in controversy in the suit before the court, and the rule is universal, that if the power is conferred to render the judgment or enter the decree, it also includes the power to issue proper process to enforce such judgment or decree (Citing). Expressed determination of this court is, that the jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until that judgment shall be satisfied." Also see *Root* v. *Woolworth*, 150 U. S. 401.

F.

Congressional Approval and Acquiescence.

Respondent respectfully submits that the majority of this Court has failed to follow its settled decisions as to the construction to be placed upon a statute where it has been reenacted without change after judicial interpretation, and that the reenactment of Section 265 in the Judicial Code of 1911, in the light of the decisions, neces-

sitates the interpretation approved in the dissenting opinion and contended for by respondent here.

Congress restated Section 265 in the Judicial Code of 1911 without change, and in the light of *French* v. *Hay*, *Dietzsch* v. *Huidekoper*, *Julian* v. *Central Trust Co.*, *Sharon* v. *Terry* and *Garner* v. *Second National Bank*, *supra*, together with other cases. In those circumstances the rule laid down by this Court is plain and inescapable.

Sessions v. *Romadka*, 145 U. S. 29, 42.
Camp v. *Gress*, 250 U. S. 308, 315.

In the last cited case the court had under consideration Section 51 of the Judicial Code, and said:

> "If Congress, in reenacting the provisions of Sec. 51, had intended that it should establish a rule with reference to defendants resident in different states contrary to the construction placed by the overwhelming weight of authority upon the identical provision contained in the earlier statute, it would have expressed that intention in unmistakable language."

Heald v. *District of Col.*, 254 U. S. 20, 23:

> "* * * the settled rule that where provisions of a statute had prior to their reenactment a settled significance, that meaning will continue to attach to them in the absence of a plain implication to the contrary."

Julian v. *Manhattan Ry. Co.*, 289 U. S. 479, 500:

> "* * * as this Court has often pointed out reenactment operates as an implied legislative approval of the prior construction—in other words, as a reenactment of the statute as before construed."

In this connection we submit that the court inadvertently overlooked the expressions of acquiescence by Congress in the exceptions to Section 265 which had been recognized by this Court, as evidenced by the provisions of the Act of June 16, 1910, Ch. 309, Sec. 17, 36 Stat. 557; Act of May 14, 1933, Ch. 283, Secs. 1 and 2, 48 Stat. 775; Act

of August 21, 1937, Ch. 276, Secs. 1 and 2, 50 Stat. 738, discussed at pages 44-46 of respondent's supplemental brief.

G.

The Importance of Supporting Power of Federal Courts to Prevent Relitigation.

In the "Foreword," *supra*, respondent has endeavored to present a brief picture of the result to litigants of abandoning that construction of Section 265 which permits the federal courts to protect their decrees and prevent relitigation.

No one can point to any decision of state courts complaining of the construction here contended for. The state courts themselves have consistently upheld their right to enjoin parties from suing in federal courts,[4] and this Court has upheld that right in *Lida, Princess,* v. *Thompson,* 305 U. S. 456.

To say that a federal court shall have the right to effectuate and protect its own decrees and preserve the rights of litigants before it by injunction is to do no more than to uphold the rights, dignity and standing of that court as one of equal rank and standing with the state courts. It is in accord with the following statement of the desirable aims of legislation regulating the organization of federal courts by Mr. Felix (now Mr. Justice) Frankfurter in Volume 38, The New Republic April 24, 1939:

> "To make the fullest use of our judicial resources, to simplify as much as possible the inequitable complexities of a system of courts spanning a continent, to secure a fair balance between federal system and

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[4] *Akerly* v. *Vilas,* 15 Wis. 401; *Home Ins. Co.* v. *Howell,* 24 N. J. Eq. 238; *Karcher* v. *Burbank,* 303 Mass. 303, 311; *In re Dawley,* 99 Vt. 306; *Connecticut Mut. Life Ins. Co.* v. *Merritt-Chapman-Scott Corp.,* 19 Del. Ch. 103.

state judiciaries, to maintain the authority of the federal courts through the prestige of its judges, to relieve the Supreme Court from all obstructions to the performance of its duties as the ultimate tribunal in our federalism."

Certainly to strip the federal courts of their power to effectuate their own decrees will not simplify but will add to the complexities of our judicial system; will upset the balance between the federal system and state judiciaries by denying to the federal courts equitable powers recognized as belonging to the state courts; will destroy rather than maintain the authority of the federal courts, and while it may not obstruct this Court in the performance of its duties, it will certainly add to those duties in such a case as this, where the Court may be called upon to review five state court decisions involving one main proposition, where the whole matter can in this suit be disposed of at one time.

Even Mr. Warren in his article "Federal and State Court Interference," 43 Harvard Law Review 345, 368, 369, several times referred to in the majority opinion, admits that the decisions of this Court, while amounting in his personal opinion to a "grafting" upon the Act of 1793, have been "undoubtedly promotive" of "complete justice" and preventive of "unseemly conflict of authority."

III.

The Court in Its Opinion Failed to Consider the Question of the Jurisdiction of the Federal Court As a Court of Equity to Restrain a Party Before It from Subjecting His Adversary to a Multiplicity of Suits.

In the majority opinion no reference is made to the specific situation involved in the instant case where respondent is threatened with five separate suits in Delaware, all involving the common question as to what was determined and adjudicated in the main case. This mat-

ter was presented to the Court in respondent's brief appearing at pages 181-187, and in its supplemental brief at pages 30-35. We feel that the equitable questions alleged are entitled to consideration and in and of themselves warranted the granting of the injunction here involved.

IV.

Conclusion.

The majority opinion concludes:

> "We must be scrupulous in our regard for the limits within which Congress has confined the authority of the courts of its own creation."

May respondent in all earnestness and with the deepest respect suggest that the Court should likewise be scrupulous in sustaining the rights, dignity and standing of the national courts as being of equal rank and standing with the state courts, and in its regard for the rights of litigants; particularly those who were brought into the national courts and required there to defend their rights; to the end that justice may be done.

V.

Prayer.

For the foregoing reasons it is respectfully urged:

(1) That the decision of this Court be modified to affirm that portion of the decree of the Circuit Court of Appeals for the Eighth Circuit which affirmed paragraph (f) of the decree of the trial court commanding petitioner to satisfy, release and remove from the records the $50,000 mortgage referred to in the record:

(2) That as to the remainder of the decree, this petition for rehearing be granted and that the decree of the

Circuit Court of Appeals for the Eighth Circuit be, upon further consideration, in all things affirmed.

Respectfully submitted,

FRED A. ONTJES,
WILLIAM C. GREEN,
Counsel for Respondent.

I, the undersigned, one of the counsel for the above named respondent, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

FRED A. ONTJES.